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No. 99-

IN THE

Supreme Court of the United States

MICHAEL DEVEGTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "intangible right of honest services" wire fraud statute, 18 U.S.C. § 1346, should be construed narrowly and limited to public officials and public fiduciaries, thus excluding private citizens like petitioner.

2. Whether 18 U.S.C. § 1346 should be construed narrowly and, if extended to private citizens, limited to those who owe a clear fiduciary duty to their employers under state law, thus excluding petitioner and others who allegedly breach agreements to perform nondiscretionary services and do not control decisions.

3. Whether applying 18 U.S.C. § 1346 to a private citizen who did not have a clear fiduciary duty under state agency law renders § 1346 unconstitutionally vague as applied because it failed to provide fair warning.

STATEMENT PURSUANT TO SUPREME COURT RULES 14.1(b) AND 29.6

The caption contains a list of all parties to the proceedings in the Eleventh Circuit, with the exception of co-appellee Richard Poirier, Jr.

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Petitioner Michael deVegter respectfully requests the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit regarding the application of 18 U.S.C. § 1346 to private citizens who do not have a fiduciary duty to the alleged victim.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 198 F.3d 1324 and is copied at Appendix A. The opinion of the district court is unreported and is copied at Appendix B. A copy of the report and recommendation of the magistrate judge is at Appendix C.

STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Eleventh Circuit entered its judgment on December 29, 1999 (Appendix A), and it denied the petition for rehearing and petition for rehearing en banc on March 1, 2000. (Appendix D.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED IN CASE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

A. Material facts alleged in indictment.

The indictment alleges that petitioner deVegter was employed by Stephens, Inc., which was hired in mid-summer 1992 by Fulton County, Georgia, as one of two equal co-advisors to recommend bond underwriters. (App. E at 56a (¶ 2), 58a (¶ 9).) Neither deVegter nor Stephens previously had advised Fulton County. Since he gave non-binding

recommendations on underwriters and otherwise did not have discretion or authority to bind Fulton County, he was not its agent and is not alleged to be. The indictment alleges that deVegter did not control the underwriter selection process, which was a political process controlled by the seven elected Fulton County Commissioners. (App. E at 64a (¶ 17.c).)

The indictment alleges that, months after the Fulton County Commission selected underwriters, one of the lead underwriters indirectly paid deVegter, allegedly for steering business its way. (App. E at 62a.) The agreement to pay allegedly was made before underwriters were selected. (App. E at 64a.) Richard Poirier, who is indicted along with deVegter, allegedly acted on behalf of the underwriter. (App. E at 57a.)

The indictment does not allege that deVegter owed Fulton County a fiduciary duty. Without factual predicate in contract or otherwise, the indictment merely asserts conclusions of law that deVegter owed Fulton County a legal duty to act honestly, faithfully, and in its best interest. (App. E at 56a (¶ 2).)

The indictment does not allege any wrongdoing on the part of any official or employee of Fulton County. Nor does the indictment allege that deVegter lobbied any decisionmakers for Fulton County concerning their choice of underwriters. Fulton County has never complained about the services it received from Stephens, deVegter, or the lead underwriter, and the indictment does not allege otherwise.

B. Proceedings below.

The instant indictment charges defendants deVegter and Poirier with wire fraud and honest services fraud in violation of 18 U.S.C. §§ 1343 and 1346. (App. E at 70a.) Defendants moved to dismiss the indictment, and the magistrate judge issued his report and recommendation to dismiss the entire indictment. (App. C at 52a.) The magistrate reasoned that defendants were not public officials and owed no "clear fiduciary duty" to Fulton County. (App. C at 41a.) He noted that the defendants were only private actors who made recommendations to the officials who ultimately made the political and economic selection of underwriters. (App. C at 41a-42a.) The magistrate also considered the "conspicuous absence of both Eleventh Circuit case law and Georgia case law which imposes a fiduciary duty on a private financial advisor such as defendant deVegter in this case." (App. C at 42a.) Moreover, since there was no contractual or employer-employee relationship, deVegter had no duty to speak. (*Id.*) Based on these findings, the magistrate concluded that the alleged conduct was, "as a matter of law, outside the scope and purview of the activities which are proscribed by Section 1343." (*Id.*)

Regarding the § 1346 charge, the magistrate reasoned that the charge hinged on deVegter's alleged duty to disclose certain information to the Fulton County Commissioners. (App. C at 48a.) The Magistrate found that deVegter's alleged "conduct is not within the clearly identifiable area of proscribed conduct as defined by relevant statute or case law." (*Id.*) Concluding that the conduct was outside of the reach of § 1346 as enacted and observing his obligation to construe the fraud statute narrowly to avoid ambiguity, the magistrate found the § 1346 charge insufficient. (*Id.*)

Finally, the magistrate found that § 1346 was unconstitutionally vague as applied to deVegter:

> the government is advocating the implementation of a broad, sweeping interpretation of Section 1346 which has never been implemented before in this Circuit. Allowing such an unprecedented reach of prohibition in this case would certainly prejudice the defendants who could not have been aware at the time of the alleged conduct that such behavior would be punishable under then existing federal law.

(App. C at 51a.)

After the government objected to the report and recommendation, the district court dismissed the § 1346 charge but sustained the § 1343 charge. (App. B.) The district court found that § 1346 applies in the private sector only when a private actor owes a "clear fiduciary duty" to the alleged victim. (App. B at 28a.) It concluded that the factual allegations in the indictment did "not permit the conclusion that Mr. deVegter owed the requisite clear fiduciary duty" to Fulton County. (App. B at 28a-29a.)

The government appealed dismissal of the § 1346 charge, and the Eleventh Circuit reversed.

THE REASONS THE WRIT SHOULD BE ALLOWED

A. The need for review on certiorari.

It is now time for the Supreme Court to resolve conflicting circuit opinions on the application of 18 U.S.C. § 1346 "honest services" fraud to private citizens, and to set a uniform rule on this important question of federal law. In the twelve years since the enactment of § 1346 in response to *McNally v. United States*, 483 U.S. 350 (1987), federal courts disparately have expanded the vague language of § 1346 to cover private citizens despite the *McNally* majority opinion's discussion of honest services cases only in the public sector, against corrupt public officials and public fiduciaries. 483 U.S. at 355. The judicial expansion into the private sector has been in varying interpretations of the phrase "intangible right of honest services," with several circuits expressly recognizing the danger of such expansion. The conflicting opinions are on whether the honest services right requires a clear fiduciary duty, and whether the existence of the right (and corresponding duty) is determined by state or federal law.

Consistent with the language of the majority opinion in *McNally*, known to Congress when it enacted § 1346, the Court should limit § 1346 to charges against public officials and public fiduciaries, who owe an inherent fiduciary duty to provide honest, impartial, and good government. *McNally* defined a public fiduciary as someone who "in fact makes governmental decisions." 483 U.S. at 355. Expansion beyond such public sector cases is untenable given the lack in the private sector of a clear dividing line between what is a federal crime and what is not.

If the Court allows § 1346 to reach private relationships, it should restrict "honest services" fraud cases to private citizens who owe a clear fiduciary duty under state agency law to their employers. Such a restriction is in line with the dissent in *McNally*, which discussed private sector cases involving "purchasing agents, brokers, union leaders and others with clear fiduciary duties to their employers." 483 U.S. at 363. After all, a defendant should not be charged under § 1346 with depriving someone of "the intangible *right* to honest services" unless the defendant owed a corresponding *fiduciary duty* to provide honest services. *See McNally*, 483 U.S. at 355. Without the requirement of a clear fiduciary duty, private citizens can be prosecuted more easily than public officials, a result hardly intended by Congress.

If private sector § 1346 cases are allowed, the existence of a fiduciary duty should be a state law question on whether the defendant is an agent to whom the alleged victim/employer has granted discretion. Without such clear demarcation, courts retroactively can invent an honest services right not reasonably understood by private citizens who provide services, including stockbrokers, lawyers, doctors, teachers, consultants, plumbers, repairmen — including virtually every service provider. The result would be an impermissible federal common-law crime of matters that in essence are state-law civil claims for breach of contract or tortious interference. Indeed, in the instant case, the facts alleged in the indictment show nothing more than a purported breach of a services agreement in response to inducement by a third-party intermeddler. This is the stuff of a state-court private action, not federal criminal prosecution.

Given the indefinite language of § 1346 and the hodgepodge of interpreting cases decided since its enactment,

this Court needs to draw a bold line separating what § 1346 covers and excludes. Otherwise, private conduct that is a federal crime in one circuit is innocent in another. Ordinary people like petitioner deVegter are not afforded fair notice that their conduct is even subject to prosecution. This latter point is proven by the findings by the magistrate judge and the district court judge that § 1346 did *not* apply to deVegter. This instant case thus raises exactly the type of issues contemplated by Rule 10 of this Court.

B. This Court should read § 1346 narrowly and limited to the "honest services" of public officials and public fiduciaries.

Section 1346 should apply only to the "honest services" of public officials and public fiduciaries. This Court has not applied § 1346 to services of private individuals in the twelve years since its enactment, although various circuit courts have.

In 1987 this Court held that the existing mail fraud statute, 18 U.S.C. § 1341, was limited to fraudulent schemes to obtain money or property and did not include deprivation of the intangible right to "honest services." *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987). The Court summarized existing case law that had allowed such an honest services crime as follows:

> Under these cases, a *public official* owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud. Also, an individual without formal office may be held to be a *public fiduciary* if others rely on him

> " 'because of a special relationship in the government' " and he in fact makes governmental decisions.

483 U.S. at 355, 107 S. Ct. at 2879 (emphasis added). Thus, this Court described intangible rights cases as limited to the services of those who hold public office and those who control governmental decisions. This Court equated "the intangible right of honest services" with "the intangible right of the citizenry to good government" and to citizens' "intangible rights to honest and impartial government." 483 U.S. at 355-56, 107 S. Ct. at 2879.

In *McNally*, this Court admonished that the wire fraud statute must be interpreted *narrowly* to avoid ambiguity and to keep the federal government from setting standards of disclosure and good government in state law matters. *McNally*, 483 U.S. at 360, 107 S. Ct. at 2881-82. *McNally* also reiterated the rule that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." 483 U.S. at 359-60, 107 S. Ct. at 2881. Conduct must be "plainly within the statute" before it can be punished. *Id.* Congress must "speak more clearly than it has" if it intends to make criminal alleged fraudulent deprivation of honest services. *Id.*

A year after *McNally*, Congress enacted § 1346 to include within the existing wire and mail fraud statutes deprivation of "the intangible right of honest services," a term Congress did not define. Congress enacted § 1346 with presumptive knowledge of the law, including the majority opinion in *McNally*. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66, 102 S. Ct.

1825, 1841 n.66 (1982). Under a well-established rule of statutory construction, absent the statute dictating otherwise, terms shall have their meaning under common law or under the law of this country. *Neder v. United States*, __ U.S. __, 119 S. Ct. 1827 (1999). When Congress enacted 1346, the term "honest services" had been limited by the highest court in the land to public officials and public fiduciaries, both of whom owe clear duties to provide the citizenry "good" and "impartial" government. *McNally*, 483 U.S. at 355-56, 107 S. Ct. at 2879.

As the Seventh Circuit stated recently:

> In *McNally* the Supreme Court described the intangible rights theory this way: "A public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud." 483 U.S. at 355, 107 S. Ct. 2875. This is the theory that *McNally* disapproved as unsupported by § 1341, and that by enacting § 1346 Congress reinstated. *** Given the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity that requires doubts to be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) *McNally*.

United States v. Bloom, 149 F.3d 649, 655-56 (7th Cir. 1998).

Most § 1346 cases have been limited to direct bribery of elected public officials. *See, e.g., United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996) (elected official of the City of Atlanta), *cert. denied*, 118 S. Ct. 598 (1997);

United States v. Waymer, 55 F.3d 564 (11th Cir. 1995) (elected member of the Atlanta Board of Education), *cert. denied*, 517 U.S. 1119, 116 S. Ct. 1350 (1996).

Consistent with the majority opinion in *McNally*, the rule of lenity, the required narrow reading of the statute, and the impermissibility of creating federal common-law crimes, this Court should limit § 1346 to defendants who are public officials or public fiduciaries. Failure to do so will leave § 1346's "outer boundaries ambiguous" in the private sector, contrary to the rule of construction set forth in *McNally*. 483 U.S. at 360, 107 S. Ct. at 2882.

This danger of ambiguity has been expressed by several circuits. For example, in *Bloom*, the Seventh Circuit stated:

> [I]t is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by five years' imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie that many decisions say cannot exist.

149 F.3d at 654. *See also United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir.), *aff'd on other grounds*, 526 U.S. 398 (1998) ("In the private sector context, § 1346 poses special risks."); *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) ("[I]t would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing."); *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("Most private sector interactions do not

involve duties of, or rights to, the 'honest services' of either party."); *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997) (the application of the honest services doctrine to the private sector is "problematic").

Limiting § 1346 to public sector cases would require dismissal in the instant case of the § 1346 charge. *See DeVegter*, 198 F.3d at 1328 n.3 (the § 1346 charge against deVegter is in the private sector).

C. If this Court finds that § 1346 applies to the private sector, it should resolve the conflict in the circuits concerning whether a fiduciary duty breach is an essential element of the crime.

The dissent in *McNally* discussed limited private sector conduct that might constitute an "honest services" crime. "In the private sector, purchasing agents, brokers, union leaders and others with *clear fiduciary duties to their employers* or unions have been found guilty of defrauding their *employers*. . . ." *McNally*, 483 U.S. at 363, 107 S. Ct. at 2883 (Stevens, J., dissenting) (emphasis added).

In its first § 1346 case, this Court should resolve conflicting circuit opinions about whether, if the statute applies to the private sector, the breach of a clear fiduciary duty to the defendant's employer is an essential element of the crime. The First, Fifth, Sixth, Seventh, and D.C. Circuits have found that a fiduciary relationship is required. The Second, Eighth, and Eleventh Circuits have concluded the opposite; they have allowed for prosecutions, like in the instant case, of private citizens who provide non-discretionary services and who have not a clue that their conduct might be subject to a federal crime. The following discussion summarizes the conflicting lines of authority.

In *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), the Sixth Circuit dealt with a § 1346 charge against professor-employees of the University of Tennessee. The court squarely held that the "prosecution must prove that the employee intended to breach a fiduciary duty." *Id.* at 368. It held that "private individuals . . . may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual." *Id.* at 366.

In *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997), the First Circuit held that, for a § 1346 violation, "there must be a breach of fiduciary duty to an employer that involves self-dealing." Likewise, in *United States v. Bloom*, 149 F.3d 649, 654, 655 (7th Cir. 1998), the Seventh Circuit found a breach of a fiduciary duty to be an indispensable element of a § 1346 charge. It affirmed dismissal of the indictment's charge under § 1346.

In a pre-*McNally* case, the Fifth Circuit concluded that a consultant's contract made him an agent of an energy company, such that his undisclosed kickbacks from oil sellers violated his fiduciary duties to the company. *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), *modified*, 680 F.2d 352 (5th Cir. 1982). The court found an agency relationship and consequent fiduciary duty to be essential to wire fraud. 663 F.2d at 543. After *McNally* but before the enactment of § 1346, the Fifth Circuit reversed wire fraud convictions under the intangible rights theory. In summarizing pre-*McNally* case law, the Fifth Circuit stated:

> Strictly speaking, "intangible rights fraud" required a fiduciary relationship between the "schemer" and the party or entity defrauded;

> without a fiduciary obligation, there was no fraud in depriving another of an intangible benefit.

United States v. Herron, 825 F.2d 50, 54 (5th Cir. 1987). More recently, the Fifth Circuit affirmed convictions of athletic coaches-employees of a university under § 1346. *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996). In so doing, the court found that the coaches-employees owed the university a fiduciary duty. *Id.* at 774-75. The D.C. Circuit also requires a fiduciary duty for a § 1346 prosecution. *See United States v. Sun-Diamond Growers*, 138 F.3d 961 at 973-74 (*citing Frost* with approval to hold that the prosecution must prove that the employee intended to breach a fiduciary duty); *United States v. Defries*, 129 F.3d 1293 (D.C. Cir. 1997).

The other line of private sector § 1346 cases takes the minority view. The Second, Eighth, and Eleventh Circuits have broadly construed the statute to allow for honest services prosecutions in the absence of a fiduciary duty. In *United States v. Sancho*, 157 F.3d 918 (2d Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1076 (1999), the Second Circuit held that a § 1346 prosecution did not entail proof of the breach of a fiduciary duty. The court stated:

> What the government must prove to satisfy this element of the offense is defined by Section 1346 — not by judicial decisions that sought to interpret the mail and wire fraud statutes prior to the passage of § 1346.
>
> We therefore have no need to decide whether the consultant's duties owed to TCC are of a fiduciary nature.

Id. at 922.

Recently the Eight Circuit followed *Sancho*. In *United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000), the Eighth Circuit ruled:

> We reject the Ervastis' contention that § 1346 requires the breach of a fiduciary duty. While the defendants are correct that our decision in *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999), involved § 1346 and the breach of a fiduciary duty (and while we do not doubt that a defendant's breach of a fiduciary duty in proper circumstances may be a powerful indication that he also has deprived another of the right of honest services), the breach of a fiduciary duty is not a necessary element of § 1346. Certainly nothing in *Pennington* or in the language of either § 1341 or § 1346 suggests the contrary.

Finally, in the case below, the Eleventh Circuit ruled that it "need not decide the question reached by the district court — whether a fiduciary duty is necessary in private sector § 1346 cases." 198 F.3d at 1330. Curiously, the court reached this conclusion after noting the "well-reasoned standard" set by other circuits that the prosecution must prove that the employee intended to breach a fiduciary duty. *Id.* at 1329. Thus, in the instant case, the Eleventh Circuit sustained an indictment that alleged that petitioner deVegter did not control the underwriter selection process of the alleged victim, Fulton County, Georgia. That he was engaged to render non-discretionary services, that he was not an agent or employee of the county, that he could not bind the county to any dealings, and that his and his employer's relationship with the county was nascent were all deemed irrelevant.

A fiduciary duty can and should be an element of § 1346 even though the words "fiduciary duty" are not found in the language of the statute. In *Neder*, this Court held that materiality is an element of wire and mail fraud despite the absence of explicit statutory language. *Neder*, 119 S. Ct. at 1841. The Court stated that when Congress uses well-established terms with settled meanings, a court must infer, absent language to the contrary, that Congress intended to incorporate the common meaning of those terms into the statute. The Court concluded in *Neder* that "defraud," as used in § 1343, incorporated the common meaning of the term, which requires a material misrepresentation.

Similarly, this Court should find that a clear fiduciary duty is an essential element of a § 1346 charge. This Court should infer that Congress intended to incorporate the appropriate meaning of "honest services" into § 1346. That appropriate meaning is set out in *McNally* and is limited to the honest services of public officials, public fiduciaries, and, if extended into the private sector, employees with "clear fiduciary duties to their employers." In the public sector, public officials and public fiduciaries have the requisite fiduciary duty because of their office or because they "in fact make[] governmental decisions." In the private sector, employees or service providers should not be prosecuted under § 1346 unless they have at least an equivalent fiduciary duty as that owed by a public official or public fiduciary.

The district court as a matter of law properly found the absence of a fiduciary duty. *Williams v. Dresser Industries, Inc.*, 120 F.3d 1163, 1168 (11th Cir. 1997) (holding that "when the facts do not authorize a finding of confidential relationship, the trial court does not err in deciding the issue as a matter of law."). Because the factual allegations in the

indictment are insufficient as a matter of law, the indictment was dismissed properly. *See United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987). In the instant case, the indictment's allegations of a right to honest services are not factual, but rather mere legal conclusions that cannot be accepted by this Court as true. *See Clay v. United States*, 218 F.2d 483, 486 (5th Cir. 1955).

In sum, this Court should grant certiorari to require a clear fiduciary duty for private sector § 1346 cases.

D. State law should apply to whether an agency and fiduciary relationship exist.

The Eleventh Circuit incorrectly found that under § 1346 the "nature and interpretation of the [fiduciary] duty owed is a question of federal law." 198 F.3d at 1329. For this finding, the Court cited an Eleventh Circuit case for the proposition that the duty to disclose "may be imposed by state or federal statute or may arise from the employment relationship itself." *Id.* at 1329 n.5. In the context of the instant case and virtually every other § 1346 private sector case, however, there is no applicable federal statute imposing a fiduciary duty.[1] Nor can the "employment relationship itself" give rise to a fiduciary duty outside of state law on the subject. Other circuits look to state law to see if a fiduciary duty exists. *See, e.g., United States v. Brennan*, 183 F.3d 139, 150-51 (2d Cir. 1999); *United States v.*

1. There is no federalized fiduciary duty. *Sante Fe Industries v. Green*, 430 U.S. 462, 97 S. Ct. 1292 (1977); *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1048-49 (11th Cir. 1987) ("The [Supreme] Court [in *Green*] was reluctant to 'federalize' fiduciary principles in the securities field '[a]bsent a clear indication of congressional intent.' ").

Chestman, 947 F.2d 551, 568-69 (2d Cir. 1991) (New York law) (a "fiduciary relationship involves discretionary authority" like when an agent is entrusted with custody over property).

In *United States v. Shotts*, 145 F.3d 1289, 1293-95 (11th Cir. 1998), the Eleventh Circuit held that state law controls the definition of property under § 1341. "Defining a federal crime by reference to state law is an unusual feature of the mail fraud statute." *Id.* at 1295 n.8. The *Shotts* court so held in reliance on this Court's decision in *Carpenter v. United States*, 484 U.S. 19, 108 S. Ct. 316 (1987), which in turn had relied on its precedent that "exclusively" used state law to define property for wire fraud purposes. *See Shotts*, 145 F.3d at 1293.

Consistent with precedent that property rights under the wire fraud statute are defined exclusively by state law, and that there is no federalized fiduciary duty, the existence of the fiduciary duty element of § 1346 should be a question of state law concerning agents.

E. Because an ordinary person such as petitioner deVegter would not understand the potential liability under § 1346, it is unconstitutional for vagueness as applied.

If this Court concludes that § 1346 applies to services by private individuals, it should find that section unconstitutionally vague as applied to deVegter and other private citizens similarly situated. It is unconscionable for the government to prosecute a citizen on the basis of such a fuzzy theory of what the law should be. The magistrate judge said it well:

> [T]he government is advocating the implementation of a broad, sweeping interpretation of Section 1346 which has never been implemented before in this Circuit. Allowing such an unprecedented reach of prohibition in this case would certainly prejudice the defendants who could not have been aware at the time of the alleged conduct that such behavior would be punishable under then existing federal law.

App. C at 51a.

Both the magistrate judge and the district court judge concluded that § 1346 did not apply to the conduct of deVegter, even assuming that all factual allegations in the indictment were true. Both judges reached their conclusion after studying the statute and the applicable case law. The magistrate judge held that § 1346 was unconstitutional as applied to deVegter. On appeal, the Eleventh Circuit disagreed with the application of the statute and did not address its unconstitutionality as applied.

Presumptively, both the magistrate judge and the district court judge are studied, intelligent, and reasonable. Their formal conclusion that § 1346 did not apply to deVegter's alleged conduct *a fortiori* renders the section void for vagueness because it does not define the criminal offense with sufficient definiteness so that *ordinary people* can understand what conduct is prohibited. Stated otherwise, how could deVegter, acting reasonably in 1992, understand that his alleged conduct was a crime under § 1346 if two federal judges have now held with the benefit of research and hindsight that § 1346 did *not* apply? Neither deVegter nor any other ordinary person could come to this understanding

in 1992. Two judges are on record effectively stating that if they were in deVegter's shoes in 1992, they would *not* have considered the alleged conduct criminal under § 1346.

A statute is unconstitutionally vague if it speaks " 'in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997). Moreover, "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *Id.* And due process forbids novel judicial constructions of a criminal statute to conduct that is not fairly disclosed to be within its scope. *Id.*

Given the absence of Eleventh Circuit case law, prior to the instant case, applying § 1346 to a private citizen, neither deVegter nor any other ordinary person could understand with sufficient definiteness exactly what conduct § 1346 prohibited. Section 1346 simply does not define its reach (if any) beyond public officials and public fiduciaries. Even the dissent in *McNally* limited prior private sector cases to those involving "clear fiduciary duties" from employee to employer. 483 U.S. at 363. The absence under Georgia law of a clearly defined fiduciary relationship between deVegter and Fulton County highlights the intolerable indefiniteness of § 1346 as applied to him.

Moreover, § 1346 fails to define the criminal offense in a manner that does not encourage arbitrary and discriminatory enforcement. Under the government's theory, it could prosecute any defendant who breaches a services agreement with the intent to harm the non-breaching party.

The government does not deny that its proposed extension of § 1346 into the private sector would allow for open-ended, arbitrary, and discriminatory enforcement of matters that should be dealt with solely under state law. Prosecutors should not be allowed to make up the law as they go along. *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996).

Read literally, § 1346 is woefully indefinite in terms of what conduct is prohibited in the private sector. Private citizens like deVegter should not be punished under the vague language of § 1346 because they cannot understand with definiteness what conduct is prohibited. The government would draw no line for potential liability, thereby leading to unchecked prosecution of private citizens who provide nondiscretionary services. This is unconstitutional, because "the line should be clear." *Lanier*, 520 U.S. at 265, 117 S. Ct. at 1224. This Court should define sharply the reach of § 1346 and remedy its hazy contours.

CONCLUSION

This Court should issue the writ of certiorari in order to resolve conflicting circuit opinions and to set a uniform rule on the important federal questions concerning the reach of 18 U.S.C. § 1346: whether it is limited to public officials and public fiduciaries; whether, if extended into the private sector, it requires proof of a clear fiduciary duty; whether state or federal law control the existence of such a duty; and whether it is unconstitutional as applied.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED DECEMBER 29, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8142

D. C. Docket No. 1:97-CR-508-1

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL DEVEGTER and RICHARD POIRIER, JR.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(December 29, 1999)

Before BLACK and WILSON, Circuit Judges, and HILL, Senior Circuit Judge.

BLACK, Circuit Judge:

The Government appeals the district court's partial dismissal of the indictment against Appellees, Michael

deVegter and Richard Poirier, Jr. The indictment charged Appellees with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, and wire fraud and honest services fraud, in violation of 18 U.S.C. §§ 1343 & 1346. Appellees moved to dismiss the indictment. The district court granted the motion in part, dismissing the § 1346 counts on the ground that the allegations in the indictment were insufficient to charge violations of that section. The Government argues the district court erred in interpreting § 1346 and that the allegations were sufficient to sustain the § 1346 charges. We agree with the Government that the allegations of the indictment were sufficient to survive the motion to dismiss, and therefore reverse and remand.

I. BACKGROUND

The federal criminal charges in this case arise from alleged corruption in the process by which Fulton County, Georgia, selected an underwriter for the refunding of municipal water and sewer bonds. The following description of the facts is taken from the allegations in the indictment.

In the summer of 1992, Fulton County, acting through its Board of Commissioners, decided to take advantage of favorable interest rates by refunding some of its bonds. This process required an underwriter. For a professional recommendation about whom the county should select as the underwriter, Fulton County obtained the services of Stephens, Inc. (Stephens), an investment banking firm. Appellee deVegter was a vice president at Stephens, and was the financial advisor in charge of the Fulton County relationship.

Appendix A

Appellee Poirier was a partner at Lazard Freres & Co., an investment banking firm that desired to obtain the position of senior managing underwriter. Through an intermediary, Nat Cole, Poirier offered to pay deVegter in return for improper intervention and assistance in Lazard Freres winning the contract. Although deVegter told Cole that deVegter did not control the ultimate decision of the Fulton County Board of Commissioners, deVegter agreed to the offer.

Throughout Stephens' process of crafting its recommendation to Fulton County, deVegter repeatedly manipulated the recommendation in favor of Lazard Freres. While Fulton County's "Request for Proposals" from underwriters was being drafted, deVegter sent advance copies to Poirier and incorporated his comments to make the document more favorable to Lazard Freres. Once proposals were submitted, deVegter sent a copy of a competitor's proposal to Poirier so that he could analyze it and provide deVegter with reasons why Lazard Freres' proposal was superior. Later, after another banker at Stephens had ranked the various proposals, deVegter ordered the banker to adjust the rankings so that Lazard Freres became the first-place proposal. The final recommendation from Stephens to Fulton County accordingly ranked Lazard Freres as the best underwriter; Fulton County adopted this recommendation and awarded Lazard Freres the underwriting contract. At no time did deVegter inform Fulton County of his financial interest in recommending Lazard Freres.

The deal was completed when Poirier, through Cole, paid deVegter $41,936 for his manipulation of the selection

process. After the transaction was completed, deVegter and Poirier took steps at their respective firms to cover up the misconduct.

Appellees deVegter and Poirier were indicted for conspiracy and wire fraud, including the honest services fraud theory of § 1346. The district court sustained the conspiracy and wire fraud counts of the indictment against Appellees' motion to dismiss. The court granted part of the motion, however, concluding that the allegations of the indictment were insufficient on the § 1346 charges. The court held that § 1346 can be applied to private sector honest services fraud only when the defendant breached a "clear fiduciary duty." The court found that the indictment failed to allege such a duty and therefore dismissed the § 1346 charges.

II. DISCUSSION

This court reviews de novo the dismissal of an indictment. *See United States v. Dabbs*, 134 F.3d 1071, 1079 (11th Cir. 1998). "Under Fed. R. Crim. P. 12(b) an indictment may be dismissed where there is an infirmity of law in the prosecution; a court may not dismiss an indictment, however, on a determination of facts that should have been developed at trial." *United States v. Torkington*, 812 F.2d 1347, 1354 (11th Cir. 1987). "[T]his court must reverse a dismissal if it concludes that the factual allegations in the indictment, when viewed in the light most favorable to the government, were sufficient to charge the offense as a matter of law." *Id.*

The Government appeals the district court's dismissal of the § 1346 counts on two grounds. First, the Government

argues that the district court erred in its interpretation of private sector honest services fraud under § 1346. Second, the Government asserts that the allegations of the indictment relating to the § 1346 charges were sufficient to survive the motion to dismiss.

A. Application of § 1346 to Private Sector "Honest Services" Fraud.

The federal wire fraud statute prohibits the use of the interstate wires to carry out a fraudulent scheme. The statute provides that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, . . . for the purpose of executing such scheme or artifice," commits a federal offense. 18 U.S.C. § 1343. In addition, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

The § 1346 honest services fraud provision was enacted by Congress in 1988 after the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S. Ct. 2875 (1987). In *McNally*, the Supreme Court held that the scope of § 1343[1] encompassed only schemes to defraud another of

1. The prosecution in *McNally* involved a violation of the mail fraud statute, 18 U.S.C. § 1341. Except for the jurisdictional nexus (mails in § 1341, interstate wires in § 1343), the statutes are the same, are interpreted identically, and cases decided under one are controlling under the other. *See Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir. 1989) ("The statutes are given a similar construction and are subject to the same substantive analysis.").

money or other property rights, but not schemes to defraud another of intangible rights. *See id.* at 360. "Congress passed [§ 1346] to overrule *McNally* and reinstate prior law," which had extended wire fraud liability to schemes to defraud another of intangible rights, including an intangible right of honest services. *United States v. Lopez-Lukis*, 102 F.3d 1164, 1168-69 (11th Cir. 1997). Pre-*McNally* case law had recognized three kinds of intangible rights the defrauding of which would create wire fraud liability. First, defendants were convicted of defrauding persons of nonmonetary, intangible interests. *See McNally*, 483 U.S. at 363-64 & n.4 (Stevens, J., dissenting); *United States v. Condolon*, 600 F.2d 7, 8-9 (4th Cir. 1979) (scheme to defraud women of time, effort, and expectations with seduction scam using bogus talent agency). Second, government officials were convicted for depriving their constituents of honest governmental services. *See McNally*, 483 U.S. at 362-63 & nn.1-2 (Stevens, J., dissenting); *Lopez-Lukis*, 102 F.3d at 1168-69 (citing cases). Third, "[i]n the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions [were] found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information." *McNally*, 483 U.S. at 363 & n.3 (Stevens, J., dissenting); *United States v. Ballard*, 663 F.2d 534 (5th Cir. Unit B Dec. 1981), *modified in part on other grounds*, 680 F.2d 352 (1982).[2] Therefore, this Court has noted that although the paradigm case of honest services fraud is the bribery of a public official, § 1346 is not limited

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2. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), this Court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

to such conduct but extends to the defrauding of some private sector duties of loyalty. *See Lopez-Lukis*, 102 F.3d at 1165 n.1. This case involves the alleged commission of honest services fraud by private sector defendants, not a defrauding of the public of the honest governmental services of a public official.[3]

The meaning of the "intangible right of honest services" has different implications, however, when applied to public official malfeasance and private sector misconduct. Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. *See Lopez-Lukis*, 102 F.3d at 1169. "If the official instead secretly makes his decision based on his own personal interests — as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest — the official has defrauded the public of his honest services." *Id.* When the prosecution can prove the other elements of the wire fraud offense,[4] taking

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3. Public sector honest services fraud falls into two categories. First, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud." *McNally*, 483 U.S. at 355. Second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *Id.* (quotation omitted). In this case, it is not alleged that deVegter deprived *the public* of honest *governmental* services. Rather, the indictment alleges that he deprived *Fulton County* of honest *commercial* services by providing corrupted financial advice. Thus, the § 1346 violation charged in this case concerns the defrauding of honest services in the private sector.

4. The elements of a § 1343 wire fraud offense are that the defendant "(1) intentionally participated in a scheme to defraud; and (2) used wire communications to further that scheme." *United*

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kickbacks or benefitting from an undisclosed conflict of interest will support the conviction of a public official for depriving his or her constituents of the official's honest services because "[i]n a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated." *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996). Illicit personal gain by a government official deprives the public of its intangible right to the honest services of the official.

On the other hand, such a strict duty of loyalty ordinarily is not part of private sector relationships. Most private sector interactions do not involve duties of, or rights to, the "honest services" of either party. Relationships may be accompanied by obligations of good faith and fair dealing, even in arms-length transactions. These and similar duties are quite unlike, however, the duty of loyalty and fidelity to purpose required of public officials. For example, "[e]mployee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer. An employee's undisclosed conflict of interest does not by itself necessarily pose the threat of economic harm to the employer." *United States v. Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983). A public official's undisclosed conflict of interest, in contrast, does by itself harm the constituents' interest

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States v. Brown, 40 F.3d 1218, 1221 (11th Cir. 1994). In addition, the Supreme Court recently held that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder v. United States*, __ U.S. __, 119 S. Ct. 1827, 1841 (1999). Finally, of course, the Government must identify of what the victim has been defrauded — for example, money, property, or the § 1346 intangible right of honest services.

in the end for which the official serves — honest government in the public's best interest. The "intangible right of honest services" must be given an analogous interpretation in the private sector. Therefore, for a private sector defendant to have violated the victim's right to honest services, it is not enough to prove the defendant's breach of loyalty alone. Rather, as is always true in a breach of loyalty by a public official, the breach of loyalty by a private sector defendant must in each case contravene — by inherently harming — the purpose of the parties' relationship.

Other Circuits have established a well-reasoned standard for determining whether private sector misconduct rises to the level of violating the victim's right to "honest services" under § 1346. "The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997) (citing *Lemire*, 720 F.2d at 1337), *cert. denied*, 119 S. Ct. 40 (1998); *see also United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (citing *Jain*, 93 F.3d at 441-42); *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973-74 (D.C. Cir.), *aff'd on other grounds*, 526 U.S. 398 (1998); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997); *cf. Ballard*, 663 F.2d at 540 ("a breach of fiduciary duty can constitute an illegal fraud under § 1341 only when there is some detriment to the employer"). The nature and interpretation of the duty owed is a question of federal law.[5]

5. *See, e.g., Frost*, 125 F.3d at 366 ("Federal law governs the existence of fiduciary duty under the mail fraud statute."); *Lemire*, (Cont'd)

The cases illuminate this standard for a defrauding of "honest services" in the private sector. In *Frost*, university professors violated § 1346 by knowingly accepting plagiarized dissertations from graduate students, defrauding the university of their fiduciary duties as professors by awarding fraudulently earned degrees and foreseeably harming the university's reputation if the illegitimacy of the degrees were exposed. *See* 125 F.3d at 366-68. Similarly, in *Sun-Diamond Growers*, a partner in a public relations firm violated § 1346 by funneling illegal campaign contributions to a candidate, for which it was reasonably foreseeable that the firm would suffer a significant loss in its primary asset, its public reputation. *See* 138 F.3d at 973-74. In *Ballard*, by comparison, an energy company hired a consultant to obtain the best oil purchase contracts possible, including a right of first refusal for the company. *See* 663 F.2d at 537-42. This Court concluded that the consultant's contract made him an agent of the company, so his undisclosed kickbacks from oil sellers violated his fiduciary duties to the energy company and harmed the company because the nondisclosure was material to the relationship. *See id.* at 540-44 & n.22 (holding, on honest services theory prior to enactment of § 1346, that

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720 F.2d at 1335-36 ("The duty breached need not arise from state or federal law; in particular, it may stem from an employment relationship of the sort that imposes discretion and consequently obligations of loyalty and fidelity on the employee."); *cf. Ballard*, 663 F.2d at 541 ("the duty to disclose . . . may be imposed by state or federal statute or may arise from the employment relationship itself"); *cf. also McNally*, 483 U.S. at 377 n.10 (Stevens, J., dissenting) (fraudulent scheme need not violate state law to support federal mail fraud conviction).

conduct constituted violation of § 1341 mail fraud statute). Likewise, in *Pennington*, a CEO violated § 1346 by breaching his fiduciary duty to obtain the most advantageous contracts for the company in return for undisclosed kickbacks. *See* 168 F.3d at 1065. In contrast, § 1346 liability was rejected in *Jain* because although the defendant psychiatrist took unethical referral fees from drug companies, the court concluded that he did not have the specific intent to defraud his patients of his fiduciary duty and that the nondisclosure of the fees was not a material harm to the patients because it did not affect the quality of their treatment. *See* 93 F.3d at 441-42. Similarly, in *Czubinski*, the defendant browsed through his employer's confidential files without authorization, but the court concluded that there was no intent to defraud the employer of the employee's honest services because the employee achieved no private gain from his action. *See* 106 F.3d at 1077. Thus, a private sector violation of § 1346 honest services fraud involves a breach of a fiduciary duty and reasonably foreseeable economic harm.

B. Sufficiency of the Allegations of the Indictment.

We next must determine whether the allegations of the indictment were sufficient to survive the motion to dismiss in this private sector § 1346 honest services case. We agree with the Government that the allegations of Fulton County's right to deVegter's honest services were sufficient.[6]

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6. There is no dispute that the indictment alleges the other elements of the offense. *See supra* note 4. The indictment expressly alleges that Appellees had the specific intent to defraud Fulton County and used the wires in executing the scheme. Although the

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The indictment does not allege in exact words that deVegter owed a "fiduciary" duty to Fulton County. Linguistic precision is not required in an indictment, however. Instead, an indictment may be short and simple — its allegations are sufficient if they include all elements of the offense and briefly describe the facts of the commission of the offense. *See, e.g.*, *United States v. Adkinson*, 135 F.3d 1363, 1375 n.37 (11th Cir. 1998) ("An indictment need do little more than track the language of the statute charged to be sufficient."); *United States v. Fern*, 155 F.3d 1318, 1325 (11th Cir. 1998) (indictment sufficient if factual allegations stated therein warrant inference that jury found probable cause for all elements of offense).

The allegations of the indictment implicitly allege that deVegter breached a fiduciary duty owed to Fulton County. Fulton County retained Stephens to provide "independent advice" about whom to hire as an underwriter, and Stephens disclaimed any conflict of interest. "[A]s a financial advisor to Fulton County," deVegter "had a duty to act honestly and faithfully in all of his dealings with Fulton County, and to transact business in the best interest of Fulton County." This duty included obligations "to make full and fair disclosure to Fulton County of any personal interest or profit" and "not to disclose confidential information received in his capacity as a financial advisor." In addition, Fulton County:

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indictment was issued prior to the Supreme Court's decision in *Neder*, we conclude that the same allegations that support the sufficiency of the allegation of deVegter's duty also sufficiently allege that the nondisclosure of the bribe was material to Fulton County.

> *relied upon* [deVegter] to (a) participate in the formulation of a "Request for Proposals" (the "RFP") to send to prospective underwriters, (b) *independently review and evaluate* underwriting proposals submitted in response to the RFP, and (c) make an *independent recommendation* to the Fulton County Board of Commissioners regarding which investment firms should be [hired as underwriters].

(emphasis added). In breach of these obligations, deVegter took a bribe from Poirier to manipulate Stephens' recommendation in favor of Lazard Freres, improperly disclosed documents to Poirier, and failed to disclose the conflict of interest to Fulton County.

Taken together, the allegations of the indictment sufficiently allege that deVegter owed a fiduciary duty to Fulton County. We therefore need not decide the question reached by the district court — whether a fiduciary duty is necessary in private sector § 1346 cases.[7] The allegations

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7. It is clear that a breach of a fiduciary duty, when accompanied by reasonably foreseeable economic harm, is sufficient to state a private sector violation of § 1346. Most private sector § 1346 honest services fraud cases decided in the other Circuits, *see supra* section II.A., like this case, have involved breaches of fiduciary duties. *But cf. United States v. Sancho*, 157 F.3d 918, 921-22 (2d Cir. 1998) (relying on text of § 1346 to conclude that court need not decide whether duty owed by private sector consultant was fiduciary because the court found "no doubt" that duty "comes within the statute's requirement of an 'intangible right of honest services' "), *cert. denied*, 119 S. Ct. 1076 (1999); *Lemire*, 720 F.2d at 1336-37 (discussing importance of requirement of foreseeable economic harm caused by employee's intent to defraud employer without stating that employee owed fiduciary duty).

describe a relationship in which Fulton County relinquished de facto control of the underwriter selection decision to Stephens. Although the Board of Commissioners nominally retained the ultimate decision, the reality was that Stephens — and, by extension, deVegter — maintained a position of dominance, superiority, and influence over Fulton County. Just as the contract and relationship in *Ballard* made the consultant an agent owing a fiduciary duty of loyalty to the energy company that was violated by undisclosed kickbacks, this indictment alleges that deVegter had a fiduciary relationship with Fulton County because he was vested with a position of dominance, authority, trust, and de facto control in recommending an underwriter.[8]

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8. "At the heart of the fiduciary relationship lies reliance, and de facto control and dominance. The relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other." *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (citations and quotations omitted). In reversing a conviction because of improper venue, the Second Circuit criticized the indictment and noted that:

> We think the elements of domination or control are of particular importance in a case like this one [involving "nondisclosures to sophisticated corporations in arms-length contractual insurance relationships"], where all parties to the various contractual relationships were concededly sophisticated companies with experience in the industry, and where the alleged victims had a variety of practical and contractual rights to participate in or challenge defendants' decisions.

United States v. Brennan, 183 F.3d 139, 150-51 (2d Cir. 1999). In this case, by contrast, the element of de facto control by the defendant is present.

Finally, the indictment sufficiently alleges that reasonably foreseeable economic harm to Fulton County was a consequence of Appellees' fraudulent scheme. As described above, the purpose of Fulton County's employment of deVegter was to obtain an independent recommendation about the best underwriting proposals submitted. Corrupting the process by which this recommendation was made poses a reasonably foreseeable risk of economic harm to Fulton County because the best underwriter might not be recommended. The indictment then further specifically alleges that deVegter "directed [another] banker to change the rankings by elevating Lazard to first place." By affirmatively acting to recommend an inferior proposal over a superior one, deVegter inflicted reasonably foreseeable economic harm on Fulton County.

The district court therefore erred when it concluded that the indictment's allegations regarding Fulton County's right to deVegter's private sector honest services were insufficient to sustain the § 1346 charges. We reverse the district court's dismissal of those charges and remand for proceedings consistent with this opinion.

III. CONCLUSION

For the foregoing reasons, the order of the district court dismissing the § 1346 counts of the indictment against Appellees is reversed, and the case remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8142

District Court Docket No. 1:97-CR-508-1

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL DEVEGTER and RICHARD POIRIER, JR.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before BLACK and WILSON, Circuit Judges, and HILL, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby

Appendix A

REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

Entered: December 29, 1999
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: APR 04 2000

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED JANUARY 22, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRIMINAL INDICTMENT
NO. 1:97-CR-508-WBH

UNITED STATES OF AMERICA,

v.

MICHAEL DEVEGTER and
RICHARD POIRIER, JR.

ORDER

On December 3, 1997, the grand jury sitting in the Northern District of Georgia returned a two-count indictment charging defendants Michael deVegter and Richard Poirier, Jr. with conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 (Count I) and with wire fraud and honest services fraud in violation of 18 U.S.C. §§ 1343 and 1346 (Count II). On March 2, 1998, defendants moved to dismiss the indictments. On August 6, 1998, the magistrate judge issued his Report and Recommendation, in which he recommended that defendants' motions be granted, and that the indictments be dismissed. Before the Court are the magistrate judge's Report and Recommendation [48], the government's objections thereto [49], the defendants'

responses to the government's objections [51,52], the government's reply [54], and the defendants' supplemental briefs [57, 58].[1] For the reasons that follow, defendants' motions are GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

When reviewing a motion to dismiss an indictment, the Court must treat the allegations in the indictment as true and construe all facts in the light most favorable to the government. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16, 72 S.Ct. 329, 332, 96 L.Ed. 367 (1952). Taking the allegations in the indictment as such, the following facts emerge:

This case arises out of the Fulton County Board of Commissioners' decision — in June or July of 1992[2] — to take advantage of a decline in interest rates by issuing a new series of municipal bonds to refund (or replace) outstanding bonds that bore higher interest rates ("the 1992 Refunding"). Several months prior to deciding to go ahead with the 1992 Refunding, however, Fulton County had decided to seek applicants for the position of county financial advisor. The county financial advisor's primary role would be to assist and provide independent advice concerning the financing of the county's capital and operating programs, and to assist in the selection of investment banking firms. Applicants were

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1. The Court GRANTS AS UNOPPOSED deVegter's motion [55] for leave to file a supplemental brief and Poirier's motion [58] to adopt deVegter's supplemental brief.

2. The dates in the indictment are "on or about".

required to make an affirmative statement that their retention would not result in a conflict of interest with any party affected under the county's capital and operating program. Applicants were also advised that the financial advisor would be precluded from participating as a representative for underwriters of Fulton County Bond issues. In June, 1992, Fulton County selected both Stephens, Inc. and Carmona Motley, Inc. to serve as co-financial advisors to Fulton County, beginning July 1, 1992.

As of July 1, 1992, deVegter, a vice president in the Atlanta office of Stephens, was assigned to Fulton County as its co-financial advisor. As part of the duties of this position, he was required to assist with the 1992 Refunding by (1) participating in the creation of a Request for Proposals ("RFP") to send to prospective underwriters, (2) independently reviewing and evaluating underwriting proposals submitted in response to the RFP, and (3) making an independent recommendation to the Fulton County Board of Commissioners regarding which underwriting firms should be included in the 1992 Refunding.

Sometime during the summer of 1992, defendant Poirier, a partner in the New York investment banking firm Lazard Freres & Co., had authorized Nat Cole, a Florida resident in the business of putting investment banking firms and local governments together, to approach deVegter and request that deVegter use his position as Fulton County's co-financial advisor to improperly assist Lazard in obtaining the senior underwriter position for the 1992 Refunding. Poirier instructed Cole to inform deVegter that Lazard would secretly compensate deVegter through Cole if Lazard

obtained the senior underwriter position. Cole did as he was instructed, and deVegter agreed to this arrangement. DeVegter noted, however, that he did not control the underwriter selection process.

On July 29, 1992, deVegter caused a facsimile transmission of a draft of the RFP to be sent to Poirier for Poirier's review and comments. In August, 1992, deVegter caused certain changes to be made to the draft RFP for the benefit of Lazard. On August 12, 1992, deVegter caused a facsimile transmission of a near-final draft of the RFP to be sent to James Eaton[3], a vice president in Lazard's municipal finance department who reported to Poirier, in Tallahassee, Florida. On August 13, 1992, James Eaton caused a facsimile transmission of a near-final draft of the RFP to be sent to Lazard's New York office.

On August 17 and 18, 1992, deVegter caused the official RFP to be sent via Federal Express for delivery by the second business day to investment banking firms interested in participating in the underwriting process. In late August, 1992, more than thirty investment banking firms, including Lazard, submitted responses to the RFP. On August 30, 1992, deVegter caused a facsimile transmission of a copy of the Bear Stearns & Co., Inc. underwriting proposal to be sent to Lazard's New York office to allow Lazard to compare its bid with Bear Stearns' bid, and to allow Lazard to provide deVegter with arguments that its proposal was the better of the two.

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3. The Court has accepted Eaton's guilty plea to wire fraud in violation of 18 U.S.C. §§ 1343 and 1346 based on the scheme alleged in the indictment.

Appendix B

On August 31, 1992, Poirier or another Lazard employee acting at his direction sent to deVegter by facsimile transmission a one-page document analyzing and comparing the underwriting proposals of Lazard and Bear Stearns. This document also provided deVegter with arguments as to why Lazard's proposal was preferable to Bear Stearns'.

Between August 31 and September 2, 1992, deVegter instructed another Stephens banker to review and rank the more than 30 underwriting proposals submitted to Fulton County in response to the RFP. Between August 31 and September 2, 1992, after the other Stephens banker had completed ranking the proposals, deVegter directed the other banker to change the rankings by elevating Lazard to first place. Then, on September 2, 1992, deVegter signed a joint recommendation to the Fulton County Board of Commissioners recommending that Lazard be awarded the senior management underwriting position on the 1992 Refunding.

On September 16, 1992, the Fulton County Commission approved the recommendation of the selection committee and appointed Lazard as senior bookrunning manager for the 1992 Refunding. Lazard then signed a contract with Fulton County on October 29, 1992, and the Fulton County Board of Commissioners adopted the contract on November 4, 1992.

On December 9,1992, Lazard issued a check payable to Nat Cole & Associates, Inc. for $83,872, and Poirier caused this check to be delivered to Nat Cole & Associates, Inc. Cole deposited this check in his firm's bank account, and

then wrote a check for $41,936 (one-half the amount of the check from Lazard) payable to deVegter. On December 11, 1992, deVegter and Cole had a telephone conversation regarding the manner in which the $41,936 payment would be delivered to deVegter. On December 11, 1992, Cole caused the $41,936 check payable to deVegter to be delivered via Federal Express to deVegter's residence. On December 14, 1992, this check was deposited into deVegter's personal account at NationsBank of Georgia.

In August or September, 1995, deVegter removed and disposed of certain documents in the Stephens files pertaining to the 1992 Refunding. In 1995, Poirier advised and encouraged Eaton to withhold material information concerning the use of false invoices to pay Cole for fabricated consulting services. From December 1995 to February 1996, Poirier advised and encouraged Eaton to make false statements about material facts to the Securities and Exchange Commission concerning the 1992 Refunding. Finally, in June, 1996, deVegter asked Cole to falsely claim that the $41,936 payment deVegter received from Cole in 1992 was actually compensation for services deVegter provided to clients of Cole other than Lazard.

II. ANALYSIS

A. Standard of Review

Because the government objects to the magistrate judge's Report and Recommendation, the Court must carefully consider these objections and will conduct a *de novo* review. *Nettles v. Wainwright*, 677 F.2d 404, 409 (5th Cir. Unit B 1982).

Appendix B

B. Standard for Dismissal of an Indictment

An indictment is sufficient and should not be dismissed "if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Dabbs*, 134 F.3d 1071, 1079 (11th Cir. 1998). Although "[a]n indictment need do little more than track the language of the statute charged to be sufficient," *United States v. Adkinson*, 135 F.3d 1363, 1375 n.37 (11th Cir. 1998), "[i]n order to be valid, an indictment must allege that the defendants performed acts which, if proven, constitute the violation of the law for which they are charged." *Id.* at 1372 n.23 (citing *United States v. Polychron*, 841 F.2d 833 (8th Cir. 1988).

C. Section 1343 Wire Fraud Counts[4]

The government objects to the magistrate judge's recommendation that defendants' motions to dismiss be

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4. The wire fraud statute, 18 U.S.C. § 1343, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any

(Cont'd)

granted as to the section 1343 wire fraud counts. The magistrate judge based this recommendation solely on his conclusion that, based on the allegations in the indictment, deVegter owed no duty, as a matter of law, to disclose to Fulton County his improper relationship with Poirier. Relying on *Belt v. United States*, 868 F.2d 1208 (11th Cir. 1989), the government contends that the indictment sufficiently states a section 1343 charge independent of a duty to disclose. The Court agrees.

In *Belt*, the United States Court of Appeals for the Eleventh Circuit held that a section 1343 charge lies where a defendant releases his employer's confidential bid information to third parties in exchange for bribes. The *Belt* court noted that because "the confidentiality of the information was integral to the proper operation of the employer's business and to its reputation . . . the confidential information constituted an intangible property right protected under section 1343." *Belt*, 868 F.2d at 1213.

The same reasoning applies to the instant case. The Court has little trouble concluding that the confidentiality of the

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(Cont'd)

> writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both . . .

Thus, the elements of wire fraud are (1) intentional participation in a scheme to defraud, and (2) use of wire communications to further that scheme. *United States v. Ross*, 131 F.3d 970, 984 (11th Cir. 1997).

information generated during the bidding process for selecting the senior underwriter for the 1992 Refunding was integral to the proper operation of Fulton County and to its reputation. As in *Belt*, this confidential information constituted an intangible property right protected by section 1343, and the indictment's allegation that deVegter released this confidential information to third parties in return for bribes is sufficient to state a section 1343 charge independent of any duty he may have had to disclose his improper relationship. Thus, pretermitting whether the indictment properly alleges facts showing deVegter had a duty to disclose to Fulton County his inappropriate relationship with Poirier, the relevant case law does not require that the indictment allege such a duty to disclose. Accordingly, defendants' motions to dismiss the section 1343 counts must be DENIED.

D. Section 1346 Honest Services Fraud

The government objects to the magistrate judge's recommendation that the defendants' motions to dismiss be granted as to the § 1346 honest services fraud counts. It argues that the magistrate judge erred in concluding that section 1346 does not apply to the private sector conduct alleged in this case. The Court disagrees.

The "honest services amendment" to the mail fraud statute, 18 U.S.C. § 1346, allows the government to predicate a mail fraud prosecution on a "scheme or artifice to deprive another of the intangible right of honest services." Congress enacted section 1346 in 1988 to overrule the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct.

2875, 97 L.Ed.2d 292 (1987). *See United States v. Lopez-Lukis*, 102 F.3d 1164, 1168-69 (11th Cir. 1997). *McNally* had held that the mail fraud statute did not criminalize schemes to defraud citizens of their rights to honest government. *McNally*, 483 U.S. at 359, 107 S.Ct. at 2881. Congress' purpose in enacting section 1346 was to restore the mail fraud statute to its pre-*McNally* position by allowing mail fraud convictions to be predicated on deprivations of honest services, *Lopez-Lukis*, 102 F.3d at 1168-69, and the Eleventh Circuit considers "pre-*McNally* cases as persuasive authority in evaluating the scope of honest services fraud." *Id.* at 1169.[5]

As an initial matter, the Court notes that, contrary to defendants' arguments, there is no indication in either the plain language of section 1346 or in the Eleventh Circuit's interpretations of section 1346 that the statute is limited to government officials. To the contrary, the Eleventh Circuit has noted that although section 1346 is frequently used against government officials to combat corruption, it is "clearly not limited to schemes involving government officials." *United States v. Lopez-Lucas*, 102 F.3d 1164, 1165

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5. The government cites *United States v. Sancho*, 157 F.3d 918 (2nd Cir. 1998), for the proposition that a section 1346 charge based on private sector conduct does not require the existence of a fiduciary relationship. This is unavailing. The *Sancho* court reached this conclusion because it held that pre-*McNally* case law is irrelevant when evaluating the scope of section 1346. *Sancho*, 157 F.3d at 921-22. This holding is in direct contravention of Eleventh Circuit precedent, *see Lopez-Lukis*, 102 F.3d at 1169, which holds that pre-*McNally* case law is relevant when determining the scope of section 1346.

n.1 (11th Cir. 1997). Consequently, defendants' arguments that section 1346 does not apply to private sector conduct are unavailing.

However, the Court agrees with defendants that the reach of section 1346 to the private sector is not without limits. *See United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) ("[I]t would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing.") As such, given the absence of Eleventh Circuit case law delineating the reach of section 1346 to the private sector, pre-*McNally* case law is relevant and compels the conclusion that section 1346 only applies in the private sector to those private parties who owe "clear fiduciary duties" to their victims. *See McNally*, 483 U.S. at 363, 107 S.Ct. at 2284 (Stevens, J., dissenting) (summarizing pre-*McNally* case law on honest services fraud and finding that "[i]n the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties have been found guilty of defrauding their employers or unions [of their right to honest services] by accepting kickbacks or accepting confidential information.")[6] Therefore, because the allegations in the indictment do not permit the conclusion that deVegter owed the requisite clear fiduciary duties (such as those imposed on purchasing agents,

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6. The Court is not persuaded by the government's contention that *United States v. Ballard*, 663 F.2d 534 (5th Cir. Unit B 1981), *modified by* 680 F.2d 352 (5th Cir. Unit B 1982), compels the conclusion that section 1346 reaches the private sector conduct alleged in the indictment. To the contrary, *Ballard* is consistent with a conclusion that section 1346 only applies to private parties who owe clear fiduciary duties to their victims.

brokers, or union leaders) to Fulton County, the section 1346 counts must be dismissed.[7]

III. CONCLUSION

For the reasons stated above, Defendants' Motions to Dismiss the Indictment [18,26] are GRANTED IN PART and DENIED IN PART, in that the section 1346 counts are DISMISSED.

It is so ORDERED this 22 day of January, 1999.

s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States District Court

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7. In light of the Court's conclusion that section 1346 does not reach the conduct alleged in the indictment, the Court need not consider whether section 1346 is unconstitutionally vague as applied to deVegter.

APPENDIX C — ORDER AND REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AUGUST 6, 1998 AND FILED AUGUST 7, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NO. 1:97-cr-0508-WBH

UNITED STATES OF AMERICA

v.

MICHAEL DEVEGTER and
RICHARD POIRIER, JR.

ORDER FOR SERVICE OF REPORT
AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and this Court's Local Rule 72.1C. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served

upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied* 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 6th day of August, 1998.

s/ John E. Dougherty
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE
JUDGE

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRIMINAL INDICTMENT NO.
1:97-CR-508

UNITED STATES OF AMERICA

v.

MICHAEL DEVEGTER and
RICHARD POIRIER, JR.

Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Presently before the court are defendants' Motions to Dismiss the Indictment, filed in this court on March 2, 1998. The government responded to defendants' Motions on April 2, 1998 by filing its opposition to the Motions to Dismiss the Indictment. On April 17, 1998, defendant deVegter filed a Reply Brief Supporting Dismissal of the Indictment. On request of Counsel for defendants, an oral argument was heard before the undersigned on May 6, 1998 on the motions before the court.

Statement of Facts

During the relevant time period, defendant Michael deVegter was employed in the Atlanta office of Stephens,

Inc. ("Stephens"), an investment banking firm. (Indictment ¶2). Stephens provided financial advisory services to Fulton County beginning in July 1992. (*Id.* at ¶ 9). Carmona Motley and Company ("Carmona") served as co-financial advisor with Stephens. Accordingly, Stephens and Carmona assisted Fulton County in the selection process for underwriters for a water and sewer bond issuance. (*Id.* at ¶10). The indictment does not allege that defendant deVegter was an agent of Fulton County or that any form of principal-agent relationship ever existed between Fulton County and defendant deVegter.

Through a two-week political process controlled by its seven publicly elected Commissioners, in September 1992, Fulton County selected ten underwriters for the water and sewer bond issue. (*Id.* at ¶¶ 6, 13, 14). For the senior underwriter position, the Commissioners selected the investment banking firm of Lazard Freres ("Lazard"). (*Id.* at ¶ 14). Defendant Richard Poirier, Jr. was employed as a partner with Lazard. The indictment alleges that in December 1992, three months after Fulton County selected underwriters for the water and sewer bond issue, Lazard paid a Florida consultant, who thereafter paid defendant deVegter a portion of what the consultant received. (*Id.* at ¶ 16). More specifically, the indictment alleges that defendant Poirier authorized approaching defendant deVegter through an intermediary in order to request that defendant deVegter use his position as financial advisor to Fulton County in order to improperly assist Lazard in obtaining the senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate. The indictment also alleges that defendant deVegter performed

certain acts in order to assist Lazard and that defendant deVegter signed a joint recommendation to the Fulton County Board of Commissioners that Lazard be awarded the senior managing underwriter position without disclosing to Fulton County that he had a financial incentive to assist defendant Poirier's firm in obtaining the senior managing underwriter position in the underwriting syndicate. (*Id.* at ¶ 16).

Defendants point out that the indictment does not allege that defendant deVegter made any misrepresentation about Lazard's ability to be the senior underwriter, that Lazard was the most qualified to be the senior underwriter, or that the alleged payment changed the underwriting recommendation of Stephens, Carmona, or defendant deVegter. Moreover, defendants state that the indictment does not contend that defendant deVegter obtained or attempted to obtain money or property from Fulton County, the alleged victim in this case.

Legal Conclusions

Defendants argue that the indictment should be dismissed because it fails to allege facts sufficient to constitute wire fraud under 18 U.S.C. Sections 1343 and 1346 or conspiracy to commit wire fraud under 18 U.S.C. Section 371. Accordingly, defendants state that Federal Rule of Criminal Procedure 12(b)(2) provides that defenses or objections based on defects in the indictment must be raised by motion before trial. Thus, if the indictment fails to allege facts sufficient to constitute a prosecutable offense, a district court must dismiss the indictment. *United States v. Coia*, 719 F.2d 1120, 1122 (11th Cir. 1983), *cert. denied*, 466 U.S.

973 (1984). The defendants contend that, here, because the facts alleged in the indictment, viewed in a light most favorable to the government, are not sufficient to charge the offenses of wire fraud or conspiracy to commit wire fraud, the indictment should be dismissed.

I. Criminal Liability under 18 U.S.C. Section 1343

Defendants argue that the indictment fails to state a charge for wire fraud under Section 1343 because it does not allege that defendant deVegter intended to obtain money or property from the alleged victim in this case, Fulton County, or that defendant deVegter had the specific intent to harm Fulton County. Additionally, defendant deVegter argues that the government does not allege facts that would give defendant deVegter an affirmative legal duty to speak under Georgia law.

Defendants first contend that, when considering alleged violations of federal fraud statutes, the court should closely analyze the statutory language and the facts which are presented. *United States v. Brown*, 79 F.3d 1550, 1556 (11th Cir. 1996). Therefore, defendants argue that in this case, the indictment should be dismissed because it fails to state a charge for wire fraud under Section 1343 because it does not allege that defendant deVegter intended to obtain money or property from the alleged victim, Fulton County. Despite this assertion, however, the government contends that the plain language of the indictment precludes such a conclusion. In fact, in paragraph 19, the indictment alleges that the defendants:

> did knowingly and willfully devise and intend to devise a scheme and artifice to defraud Fulton County, Georgia, and its citizens of money and property and the good, faithful and honest services of Michael deVegter, in his capacity as a financial advisor for Fulton County, Georgia, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises.

Indictment at ¶ 19. The Eleventh Circuit has held that an indictment is sufficient if it tracks the language of the statute which creates the offense. *United States v. Adkinson*, 135 F.3d 1363, 1375 n. 37 (11th Cir. 1998) (citing *United States v. Stavroulakis*, 952 F.2d 686, 693 (2nd Cir. 1992). Hence, the government argues that an indictment is sufficient if, as in this case, it specifically refers to the statute on which the charge is based. *United States v. Stefan*, 784 F.2d 1093, 1101-1102 (11th Cir. 1986), *cert. denied*, 479 U.S. 855 (1986).

Defendants maintain however, that despite the language of the indictment, it fails because it does not "sufficiently warn [defendant DeVegter] of the charges against him so that he may adequately prepare for his defense." *Adkinson*, 135 F.3d at 1373. Thus, defendants argue that, consistent with the Eleventh Circuit's decision in *Adkinson*, the court should dismiss the Section 1343 claim because the government has not adequately stated the offense. Although the government argues that the indictment in this case is sufficient because it tracks the language of the wire fraud statute, in the case of *Russell v. United States*, 369 U.S. 749,

763-64 (1962), the Supreme Court stated that "[t]he language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense." More, defendants assert that the government's use of the *Stefan* case is misplaced. While the government states that the *Stefan* case supports the proposition that reference to the statute in the indictment establishes sufficiency of the indictment, the court in the *Stefan* case actually stated that "when an indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice." 784 F.2d at 1101-02. Accordingly, defendants maintain that, because one purpose of the indictment is to inform the court of the facts alleged sop that the court can decide whether they are sufficient to support a conviction, " 'facts are to be stated, not [just] conclusions of law alone.' " *United States v. Cruikshank*, 92 U.S. 542 (1875). However, as shown above, in the present case, the undesigned finds that the government has met its initial burden, on the face of the indictment, of sufficiently stating a charge for federal wire fraud under 18 U.S.C. Section 1343.

Defendant's affirmative legal duty to disclose the alleged payment

In order to establish a scheme to obtain money by false representations under Section 1343, the government must show that defendant deVegter:

(1) made a statement that was patently false or acted with reckless indifference as to the truth or falsity of the statement; or

(2) deceitfully concealed material facts in breach of an affirmative duty to speak.

United States v. Cochran, 109 F.3d 660, 665-67 (10th Cir. 1997). In the present case, the defendants argue that the indictment does not state that defendant deVegter made any patently false or reckless statements. Instead, the indictment alleges that defendant deVegter failed to disclose his alleged conflict of interest resulting from an alleged payment from the investment firm of Lazard Freres. Defendants contend that a failure to disclose facts, however, is only actionable if the government can demonstrate that defendant deVegter had an affirmative duty to disclose the alleged facts. *Cochran*, 109 F.3d at 665-667. Accordingly, defendants contend that defendant deVegter did not have an affirmative legal duty to disclose the alleged payment. Under Georgia law, an affirmative legal duty to speak arises only if "confidential relations" exist or "particular circumstances" mandate disclosure. O.C.G.A. §23-2-53. *Williams v. Dresser Industries, Inc.*, 120 F.3d 1163, 1167 (11th Cir. 1997). In this case, it is defendants contention that neither criteria exists.

A. Confidential or fiduciary Relationship

Defendants first argue that the indictment does not establish that defendant deVegter had a relationship with the Fulton County Commission which required disclosure of the

alleged payment. Instead, it is defendants' contention that a confidential relationship exists "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another." O.C.G.A. §23-2-58. In this case, where the indictment stated that defendant deVegter "did not control the underwriter selection process", the defendant asserts, therefore, that the indictment fails to allege sufficient facts which would establish the presence of a confidential relationship. Accordingly, the defendants contend that the indictment should be dismissed as the court may decide the confidential relationship issue as a matter of law. *Williams v. Dresser Industries*, 120 F.3d 1163, 1168 (11th Cir. 1997).

Analyzing Georgia law, defendants contend that there is no authority which articulates an affirmative duty for an advisor such as defendant deVegter to act as a fiduciary or impose a duty to speak. Similarly, defendants assert that a review of the relevant federal case law dealing with Section 1343 demonstrates that defendant deVegter did not owe a fiduciary duty to the alleged victim in the instant case. Defendants cite the case of *United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997), in which the Tenth Circuit reversed a wire fraud conviction and ultimately held that the defendant did not have a duty to disclose a fee which he had received in connection with an airport bond issue. In that case, the defendant was the head of an underwriter for a bond issuance by the Oklahoma City Airport Trust Authority ("OCAT"). The government alleged that defendant Cochran received a secret payment in exchange for steering a contract for the reinvestment of the bond proceeds to a particular bank. *Id.* at 662-63. In that case, the Tenth Circuit reversed the

defendant's conviction under 18 U.S.C. Section 1343 finding that the defendant did not have a duty to disclose the alleged fee. *Id.* at 667. Instead, the court rejected the government's arguments that the underwriting relationship between the underwriter and OCAT created a fiduciary duty or a relationship of trust and confidence between the parties which would require disclosure of the fee. *Id.* at 665-66. In rejecting the government's theory, the court stated that such an approach " 'would put federal judges in the business of creating what in effect would be common law crimes, i.e. crimes not defined by statute.' " *Id.* at 667, quoting *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir. 1986), *cert. granted and judgment vacated on other grounds*, 484 U.S. 807 (1987). *See also Matter of EDC, Inc.*, 930 F.2d 1275, 1281 (7th Cir. 1991) (court rejected lack of moral uprightness as a standard for wire fraud and mail fraud).

The government contends, however, that the *Cochran* decision is inapposite to the present case because that case involved the relationship between a municipality and an underwriter, rather than a financial advisor. In the *Cochran* case, the Tenth Circuit decided that the defendant did not have a fiduciary type relationship with the municipality during the re-investment phase of a bond transaction. Accordingly, it is the government's contention that the relationship between a financial advisor and a municipality, as alleged here, is "more akin to a fiduciary relationship" than that of an underwriter to the municipality. (Government's Brief at p. 17). However, despite this broad conclusion, the government offers no Eleventh Circuit case law to support such an interpretation of the fiduciary duty of a private individual. Instead, the government offers that the

"indictment clearly alleges the nature of defendant deVegter's position giving rise to his duty to Fulton County which was breached" by his alleged payment. (Government's Brief at p. 21).

As primary support that defendant deVegter owed a fiduciary duty to the alleged victim in this case, the government cites to the case of *United States v. Ferber*, 966 F.Supp. 90 (D.Mass. 1997), in which the court held that the defendant was not required to have decision making authority in order to commit the alleged fraud based on a fiduciary duty. That legal analysis, however, is in contravention with Eleventh Circuit precedent as well as Georgia case law. In fact, in the *Ferber* decision, as pointed out by the defendants, the court does not discuss fiduciary duty in the context of wire fraud. Additionally, the analysis of a fiduciary duty in the *Ferber* case contradicts Georgia law which requires one party to be "so situated as to exercise a controlling influence over the will, conduct, and interest of another." O.C.G.A. Section 23-2-58.

Additionally, the government cites to the case of *United States v. Lopez-Lukis*, 102 F.3d at 1170, in which the Eleventh Circuit held: "[A]s we stated long ago, '[t]he fact that the official who is bribed is only one of several and could not award the contract himself does not change the character of the [fraudulent] scheme.' " (quoting *Sushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941). What does change the character however, is the fact that in this case, the defendants are not public officials and therefore have "no clear fiduciary duty" to the alleged victim in this case. *McNally*, 483 U.S. at 363. Moreover, the character is also

altered by the fact that the defendants are private actors in this case making recommendations to officials who will ultimately make a political and economic decision. In the present case, the undersigned is hesitant to extend the reach of Section 1343 outside of the domain which has already been established by the Eleventh Circuit. Accordingly, based on the face of the indictment in the present case, the court finds that the defendants' Motions to Dismiss should be GRANTED as a matter of law.

Specifically persuasive is the conspicuous absence of both Eleventh Circuit case law and Georgia case law which imposes a fiduciary duty on a private financial advisor such as defendant deVegter in this case. Accordingly, in the case of *Tigner v. Shearson-Lehman Hutton, Inc.*, 201 Ga. App. 713 (Ga. Ct. App. 1991), the court found a fiduciary relationship in light of the requisite "controlling influence" of a financial advisor. In the present case however, there is nothing which approaches the controlling influence requirement necessary to establish a confidential or fiduciary relationship. More, in this case, there exists no specific contractual duty or employer-employee relationship which imposes an affirmative duty on the defendant to disclose such information. Accordingly, it is this court's finding that defendant deVegter's conduct is, as a matter of law, outside the scope and purview of the activities which are proscribed by Section 1343. Hence, the defendants' Motions to Dismiss should be GRANTED.

B. The Particular Circumstances Requirement

Defendants also argue that the indictment does not and cannot allege sufficient particular circumstances under

O.C.G.A. Section 23-2-53 to mandate the disclosure requirement. Instead, defendants contend that for a duty to disclose to arise, the government must show that defendant's "actions violated the terms of any contract [he] had regulating the flow of information between [him and the alleged victim]." *Dresser Industries*, 120 F.3d at 1168-69. Accordingly, defendants maintain that the instant indictment is insufficient for two reasons: (1) defendant deVegter had no contract with Fulton County; and (2) Mr. DeVegter's employer's contract with Fulton County did not "regulate the flow of information."

The defendants cite the case of *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), in support of this position. In that case, the Eleventh Circuit held that an affirmative duty to disclose must exist in order to state a wire fraud claim based on nondisclosure. In that case, the court considered whether a developer/seller of residential homes had committed mail fraud by failing to disclose that its pricing structures were inflated dramatically. The court found that no special relationship existed that would create a duty to disclose the pricing structures. *Id.* at 1557-58.

C. Materiality of the Alleged Non-Disclosure

Defendants further contend that even if the indictment in this case properly alleged a fiduciary duty between defendant deVegter and Fulton County, the indictment must nonetheless fail because the alleged non-disclosure in the instant case involved a matter that was not material. *United States v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 1350 (1996) (holding that a predicate to

mail fraud is the duty to disclose a material fact). Accordingly, in order to establish materiality the government must show that a reasonable person would have acted on the alleged omission. *United States v. Brown*, 79 F.3d at 1557 (11th Cir. 1996). Here, defendants maintain that the investment firm Lazard was qualified to underwrite the bond issue, and that defendant deVegter joined in the consensus recommendation that Lazard was best qualified. The indictment does not allege that defendant deVegter received a payment for steering the underwriting business to an operation which would not be in the best interest of Fulton County. The indictment does not allege that Fulton County suffered any actual or potential harm as a result of Lazard's ultimate selection. Ultimately, it is the defendants' position that because the alleged payment was not material, defendant deVegter did not have a duty to disclose it. Thus, defendants argue that the indictment does not establish a Section 1343 offense and therefore should be dismissed. The government contends, however, that in the case of *United States v. Neder*, No. 02-2929, 1998 WL 121604 (11th Cir. March 19, 1998), the Eleventh Circuit held that "materiality is not an element of fraud offenses in . . . section 1343." *Id.* However, in light of previous Eleventh Circuit precedent, defendants maintain that the *Neder* decision must be limited to cases of affirmative misrepresentations as opposed to mere omissions. Instead, defendants contend that the *Neder* decision does not explicitly overrule the decisions in *United States v. Connor*, 752 F.2d 566, 573 (11th Cir. 1985) (employee's failure to disclose material information to his employer); *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981) (mail fraud may be based upon duty to disclose information, but information must be material). Moreover, defendants cite

the Pre-*Neder* case of *United States v. Waymer*, 55 F.3d 564, 571 (11th Cir. 1995), in which the Eleventh Circuit explained: "[F]raud, for the purposes of a mail fraud conviction, may be proved through the defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation."

The government attests that even if materiality is relevant in proving a scheme to defraud, the defendants' contention would still not warrant a dismissal of the indictment. Accordingly, this court agrees that such a determination as to materiality is a factual issue which is not susceptible to a motion to dismiss the indictment.

Ultimately, however, for the reasons stated above, the undersigned finds that the defendants' Motions to dismiss the indictment should be GRANTED in the instant case as to the charges under 18 U.S.C. Section 1343.

II. Criminal Liability Under 18 U.S.C. Section 1346

In their Motions to dismiss, defendants contend that Section 1346, which punishes schemes to defraud another of the intangible right to honest services, does not apply to the instant case. In 1987, the United States Supreme Court held that the existing mail fraud statute did not criminalize schemes to defraud citizens of their rights to honest governmental services. *McNally v. United States*, 483 U.S. 350 (1987). One year later, Congress enacted Section 1346 in order to override the McNally decision and restore the mail fraud statute to its pre-*McNally* position by allowing mail fraud convictions to be predicated upon the deprivation

of honest services from governmental officials. *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996).

The Supreme Court in the *McNally* case summarized federal appellate case law existing at the time of its decision as follows:

> Under these cases, a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud. Also, an individual without formal office may be held to be a public fiduciary if others rely on him " 'because of a special relationship in the government' " and he in fact makes governmental decisions.

McNally, 483 U.S. at 354.

More, in the *McNally* case, the Supreme Court asserted that in mail or wire fraud cases there are "no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Id.* at 360. The court also reaffirmed that when there are two rational readings of the criminal statute, one harsher than the other, courts are to choose the harsher "only when Congress has spoken in clear and definite language." *Id.* at 359-60. Accordingly, the defendants argue that in light of the clear language in the *McNally* case limiting an "honest services" crime to public officials and public fiduciaries, Congress did not speak in clear or definite language to include as potential violators of Section 1346 those who are not public officials or not governmental decisionmakers.

Defendants contend, therefore, that Section 1346 was enacted in order to restore the mail fraud statute to its pre-*McNally* position. In fact, the Court in the *McNally* case defined that position in stating that it was limited to the deprivation of honest services to be performed by "public officials" or "public fiduciaries" if such a fiduciary "in fact makes governmental decisions." *Id.* at 355. Here, defendants maintain that the indictment specifically alleges facts that render Section 1346 inapplicable to defendant deVegter as a matter of law. Hence, while the government alleges that the co-financial advisors in this case rendered assistance and non-binding advice to Fulton County in its selection process for underwriters for a bond issue, the government alleges that defendant deVegter did not control the underwriter selection process. (Indictment ¶¶ 10, 17.C). The government also alleges that through a two week political process controlled by its seven publicly elected Commissioners, Fulton County itself made the decision on who would be an underwriter for the bond issue as well as who would be the lead underwriter. Hence, defendants maintain that the indictment should be dismissed as to Section 1346 because that section does not apply to defendant deVegter, who is not alleged to be a public or governmental official, as a matter of law.

Defendants also contend that even if Section 1346 applies to private individuals who are not public officials or public fiduciaries, it does not apply in the instant case because Mr. DeVegter did not owe a "clear fiduciary duty" to Fulton County. *McNally*, 483 U.S. at 363 (1987) (Stevens, J., dissenting). Thus, while the majority in the *McNally* decision limited the application of Section 1346 to public officials and public fiduciaries, the dissent argued that "[i]n the private

sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information." *Id.* at 363. Therefore, it is the defendants' position that even if Section 1346 applies to purely private actors, such application should be limited to defendants who owe "clear fiduciary duties" to their alleged victims.

The ultimate issue in the instant case, therefore, hinges on defendant deVegter's alleged duty to disclose information to the Fulton County Commissioners. In this case, the defendants' conduct is not within the clearly identifiable area of proscribed conduct as defined by relevant statute or case law. Instead, this court finds that the defendants fall within the penumbral area and outside the reach of 18 U.S.C Section 1346 as it was enacted. Accordingly, in light of this court's duty to interpret the fraud statute narrowly in order to avoid ambiguity, the undersigned finds that the government's indictment, based on a broad and seminal interpretation of existing federal statutory law, is insufficient. *See United States v. McNally*, 483 U.S. 350, 360 (1987); *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996).

A. Vagueness of Section 1346

Defendants also argue that Section 1346 is unconstitutionally vague as applied to the present case. A statute's vagueness is a question of law which is to be decided by the court in accordance with the Eleventh Circuit's ruling in *United States v. Paradies*, 98 F.3d 1266, 1284 (11th Cir. 1996), *cert. denied*, 118 S.Ct 598 (1997). A statute is

unconstitutionally vague if it does not define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 1283. Defendants contend, therefore, that Section 1346 fails under this test as applied to defendant deVegter.

Defendants maintain that while the Eleventh Circuit found that Section 1346 was not unconstitutionally vague as applied to government officials who accepted kickbacks, Section 1346 is unconstitutionally vague in this case, where the government fails to allege the deprivation of honest services of any government or public official. Accordingly, defendants argue that, applied to the instant case, Section 1346 is unconstitutionally vague because ordinary people cannot understand what conduct is prohibited and because the statute as applied to defendants encourages arbitrary enforcement. Conversely, the government argues that the statute is not unconstitutionally vague, but that "the fraudulent scheme perpetrated by [the defendants] comes squarely within the plain language of the statute." (Government Brief at p. 29). More, the government contends that in conducting the vagueness analysis, the Court must "assume that the defendant had constructive notice of both the statute in question and the case law interpreting the statute." *United States v. Harris*, 805 F.Supp. 166, 178 (S.D.N.Y. 1992). As pointed out by the defendants, in the ten years since the passage of Section 1346, the Eleventh Circuit has interpreted the statute in four cases. Accordingly, all of those cases have dealt with bribes directly received by public officials. *United States v. Lopez-Lukis*, 102 F.3d 1164, 1165 (11th Cir. 1997) (elected county commissioner owed a

fiduciary duty to the electorate); *Paradies*, 98 F.3d at 1282 (elected official of the City of Atlanta); *United States v. Castro*, 89 F.3d 1443, 1447-48 (11th Cir. 1996) (elected state court judge received kickbacks from attorneys for fixing cases); *United States v. Waymer*, 55 F.3d 564 (11th Cir. 1995), *cert. denied*, 117 S.Ct. 965 (1997) (elected member of the Atlanta Board of Education).

As recognized by the government, the Eleventh Circuit has not defined the scope of the intangible right to honest services in the private sector since the passage of Section 1346." (Government's Brief at p. 7). Thus, in light of the absence of any clarifying or otherwise expanding case law in the Eleventh Circuit, defendants contend that neither defendant deVegter nor any other ordinary person could understand with the requisite definiteness precisely what conduct Section 1346 prohibits. Instead, Section 1346 does not define its reach beyond public officials and public fiduciaries. As asserted by defendants, "[e]ven the dissent in [the *McNally* decision] limited prior private sector cases to those involving "clear fiduciary duties" from employee to employer. 483 U.S. at 363." (Defendant deVegter's Reply Brief at p. 11).

In support of its argument, the government directs the court to several cases cited outside of the Eleventh Circuit. For instance, the government refers to the case of *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995), in which the court found that Section 1346 was not void for vagueness. In that case, the court based its finding on relevant case law holding that state officials owe a fiduciary duty to the state and to its citizens. While that case dealt primarily with the

conduct and fiduciary obligations of state officials, the present case involves no such conduct. Instead, it is the government's contention that Section 1346 should be expanded and interpreted broadly in order to include defendants' conduct within the realm of 18 U.S.C. § 1346.

In further support of its argument against the void for vagueness doctrine, the government cites another case dealing with the conduct of an elected public official who owed a clear and undeniable fiduciary duty to the public. In *United States v. Frega*, 933 F.Supp. 1536, 1547 (S.D.Cal. 1996), the court found Section 1346 constitutional as applied to the bribery of a state superior court judge. Because the Frega case dealt with a factual situation which is clearly within the reach of conduct proscribed by Section 1346, its inclusion in the government's argument does little to advance its opposition to the application of the void for vagueness doctrine in the present case. Instead, as advanced by the defendants, the government is advocating the implementation of a broad, sweeping interpretation of Section 1346 which has never been implemented before in this Circuit. Allowing such an unprecedented reach of prohibition in this case would certainly prejudice the defendants who could not have been aware at the time of the alleged conduct that such behavior would be punishable under then existing federal law.

III. Conspiracy Under 18 U.S.C. Section 371

Defendants argue that because the facts alleged in the indictment fail to show a violation of Section 1343 or 1346, the conspiracy count must also fail as it is not a violation of 18 U.S.C. Section 371 to conspire to commit acts which are

not federal crimes. Accordingly, it the instant Report and Recommendation becomes the Order of this Court, the undersigned RECOMMENDS that the defendants' Motion to Dismiss as to the Conspiracy charge under 18 U.S.C. Section 371 also be GRANTED.

Conclusion

Based on the foregoing, and after careful consideration, the undersigned RECOMMENDS that the defendants deVegter and Poirier's Motions to Dismiss the Indictment be GRANTED as to all counts contained in the Indictment.

SO REPORTED AND RECOMMENDED, this 6th day of AUGUST, 1998.

s/ John E. Dougherty
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 1, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-8142-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL DEVEGTER and
RICHARD POIRIER, JR.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BLACK and WILSON, Circuit Judges, and HILL, Senior Circuit Judge.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

APPENDIX E — INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRIMINAL INDICTMENT NO.
1:97CR 508

UNITED STATES OF AMERICA

v.

MICHAEL DEVEGTER and
RICHARD POIRIER, JR.

Defendants.

THE GRAND JURY CHARGES THAT:

COUNT ONE
(Conspiracy)

1. Beginning in or about June 1992 and continuing through in or about June 1996, the exact dates being unknown to the Grand Jury, in the Northern District of Georgia and elsewhere, the defendants, MICHAEL DEVEGTER and RICHARD POIRIER, JR., did knowingly and willfully combine, conspire, confederate, agree, and have a tacit understanding with each other and others known and unknown to the Grand Jury to commit the offense of wire fraud, that is, to knowingly and willfully devise and intend to devise a scheme and artifice to defraud Fulton County, Georgia, and its citizens of money and property and the good,

faithful and honest services of defendant MICHAEL DEVEGTER, in his capacity as a financial advisor for Fulton County, Georgia, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, through secretly providing defendant MICHAEL DEVEGTER a financial incentive to improperly aid defendant RICHARD POIRIER, JR.'s firm in obtaining the senior managing underwriter position for the 1992 Fulton County Water and Sewer Bond Refunding, in violation of Title 18, United States Code, Sections 1343 and 1346.

BACKGROUND

At all times relevant to this Indictment:

2. Defendant MICHAEL DEVEGTER was a Vice President in the Atlanta office of Stephens, Inc. ("Stephens"), an investment banking firm having its principal place of business in Little Rock, Arkansas, which, among other things, provided financial advisory services to local governments seeking to raise money through the offering of municipal securities. Defendant MICHAEL DEVEGTER was assigned to serve as a financial advisor to Fulton County, and in that capacity defendant MICHAEL DEVEGTER had a duty to act honestly and faithfully in all of his dealings with Fulton County, and to transact business in the best interest of Fulton County, including a duty to make full and fair disclosure to Fulton County of any personal interest or profit he expected to derive from any transaction in which he participated as a financial advisor. Defendant MICHAEL DEVEGTER also had a duty not to disclose confidential information received in his capacity as a financial advisor without Fulton County's permission.

3. Defendant RICHARD POIRIER, JR., was a partner in Lazard Freres & Co. LLP ("Lazard"), a limited partnership having its principal place of business in New York, New York, which, among other things, provided investment banking services to local governments seeking to raise money through the issuance of municipal bonds. Defendant RICHARD POIRIER, JR., worked in Lazard's Municipal Finance Department, and he was the Lazard partner responsible for the development of municipal finance business in Florida, and beginning in mid-1992, was one of the Lazard partners responsible for developing underwriter business in Georgia, among other states.

4. James Eaton, not named as a defendant herein, was a Vice President in Lazard's Municipal Finance Department, and reported to defendant RICHARD POIRIER, JR. While at Lazard, defendant RICHARD POIRIER, JR., and James Eaton, whose office was located in Tallahassee, Florida, were principally involved in soliciting business from state and local governments and their agencies and instrumentalities on which Lazard would serve as underwriter with respect to the issuance of municipal securities.

5. James Nathan "Nat" Cole, not named as a defendant herein, did business under the name of "Nat Cole & Associates," from an office he maintained in Tallahassee, Florida. Cole acted as a "finder," putting investment banking firms together with local governments and government agencies seeking to raise money through the issuance of municipal bonds and other securities, in exchange for a fee. The fees were typically paid by the firms that were awarded the business.

6. Fulton County is a county in the State of Georgia and was governed by a Board of Commissioners, which at all times relevant herein, consisted of seven members, elected to four-year terms.

Selection of Financial Advisor to Fulton County

7. On or about April 6, 1992, Fulton County, Georgia, solicited proposals from prospective financial advisors to assist the County in developing and implementing strategies to meet its short and long range capital and operating financial needs. The financial advisory request specified that the primary role of the financial advisor was to assist and provide independent advice to the Fulton County Board of Commissioners concerning the financing of the County's capital and operating programs, and that the financial advisor would be expected to assist in the selection of investment banking firms.

8. Applicants were required to make an affirmative statement that their retention would not result in a conflict of interest with any party which may be affected under the County's capital and operating program. Applicants also were advised that the financial advisor would be precluded from participating as representatives for underwriters of Fulton County Bond issues.

9. On or about April 23, 1992, Stephens submitted a joint response with Carmona Motley and Company, Inc. ("Carmona Motley"), a New York-based firm, to serve as co-financial advisors to Fulton County. On or about June 3, 1992, Stephens and Carmona Motley were selected by the

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Fulton County Commission to serve as County financial advisors, their term to begin on July 1, 1992.

The Fulton Water/Sewer Bond Issue

10. As a result of a favorable decline in interest rates, in or about June-July 1992, Fulton County, with the assistance of its financial advisors, including defendant MICHAEL DEVEGTER, decided to issue a new series of municipal bonds to refund (*i.e.*, replace) certain outstanding water/sewer bonds that bore higher interest rates (hereinafter referred to as "the 1992 Fulton County Water and Sewer Bond Refunding"). In connection with the planned refinancing, Fulton County relied upon defendant MICHAEL DEVEGTER, as financial advisor, to (a) participate in the formulation of a "Request for Proposals" (the "RFP") to send to prospective underwriters, (b) independently review and evaluate underwriting proposals submitted in response to the RFP, and (c) make an independent recommendation to the Fulton County Board of Commissioners regarding which investment firms should be included in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate.

11. As part of the refunding process, Fulton County determined to issue the RFP, which requested that various investment banking firms apply for positions in an underwriting syndicate that would purchase the new water and sewer bonds from Fulton County and resell them to investors.

12. As part of the RFP process, investment banking firms interested in participating in the 1992 Fulton Water

and Sewer Bond Refunding were requested to submit proposals explaining, among other things, how best to structure and execute the transaction and their qualifications for serving in the underwriting syndicate. Over thirty investment banking firms, including Lazard, submitted responses to the RFP.

13. On or about September 2, 1992, defendant MICHAEL DEVEGTER, on behalf of Stephens, signed a joint recommendation made to the Fulton County Board of Commissioners that Lazard be awarded the senior managing underwriter position on the 1992 Fulton County Water and Sewer Bond Refunding.

14. On or about September 16, 1992, the Fulton County Board of Commissioners selected Lazard to be senior managing underwriter on the 1992 Fulton County Water & Sewer Bond Refunding.

15. On or about October 29, 1992, Lazard signed the contract, also known as the bond purchase agreement, with Fulton County under which Lazard agreed to purchase the water and sewer bonds from Fulton County. The contract was adopted by the Fulton County Board of Commissioners on November 4, 1992, in a bond resolution, and on or about November 19, 1992, the bonds were sold by Lazard and other members of the underwriting syndicate to institutional investors and the general public.

MANNER AND MEANS OF THE CONSPIRACY

16. Among the manner and means by which the defendants, MICHAEL DEVEGTER and RICHARD

POIRIER, JR., and their co-conspirators would and did carry out the conspiracy and effect its unlawful objects were the following:

A. Defendant RICHARD POIRIER, JR., authorized approaching defendant MICHAEL DEVEGTER through an intermediary, Nat Cole, to request that defendant MICHAEL DEVEGTER use his position as financial advisor to improperly assist Lazard in obtaining the senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate, with the understanding that defendant RICHARD POIRIER, JR., would cause Lazard to secretly compensate defendant MICHAEL DEVEGTER through Nat Cole if Lazard obtained the senior managing underwriter position.

B. Nat Cole contacted defendant MICHAEL DEVEGTER and asked for his assistance as financial advisor in obtaining for Lazard the senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate.

C. Defendant MICHAEL DEVEGTER agreed to provide assistance in Lazard's effort to obtain the senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate, with the understanding that defendant MICHAEL DEVEGTER would receive compensation through Nat Cole if Lazard obtained the senior managing underwriter position.

D. Defendant MICHAEL DEVEGTER performed certain acts in his efforts to assist Lazard in obtaining the

senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate.

E. Defendant MICHAEL DEVEGTER, on behalf of Stephens, signed a joint recommendation made to the Fulton County Board of Commissioners that Lazard be awarded the senior managing underwriter position on the 1992 Fulton County Water and Sewer Bond Refunding without ever disclosing to Fulton County that he had a financial incentive to assist Lazard in obtaining the senior managing underwriter position in the underwriting syndicate.

F. Defendant RICHARD POIRIER, JR., directed Nat Cole to submit false invoices to Lazard for payment of "consulting" services, including an invoice for $83,872, which Cole submitted to Lazard on or about December 1, 1992.

G. On or about December 9, 1992, defendant RICHARD POIRIER, JR., caused Lazard to issue a check made payable to Nat Cole & Associates, Inc., for $83,872. The payment was charged by Lazard to the account it maintained for the 1992 Fulton County Water & Sewer Bond Refunding.

H. On or about December 11, 1992, Nat Cole deposited the $83,872 check from Lazard into his firm's bank account, and, on the same day, Cole wrote a check for precisely one-half of that amount — $41,936 — made payable to defendant MICHAEL DEVEGTER.

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I. On or about December 14, 1992, the $41,936 check was deposited into defendant MICHAEL DEVEGTER's personal account at NationsBank of Georgia.

J. In or around August or September 1995, the specific dates being unknown to the Grand Jury, defendant MICHAEL DEVEGTER made efforts to conceal and cover up the conspiracy and its objects by removing and disposing of certain documents in the Stephens' files pertaining to the 1992 Fulton County Water and Sewer Bond Refunding.

K. In or around 1995 and 1996, the specific dates being unknown to the Grand Jury, defendant RICHARD POIRIER, JR., made efforts to conceal and cover up the conspiracy and its objects by advising and encouraging James Eaton to withhold information and to give false statements of material facts during the course of an investigation by the Securities and Exchange Commission.

L. In or around June 1996, the specific dates being unknown to the Grand Jury, defendant MICHAEL DEVEGTER asked Nat Cole to falsely claim that the $41,936 payment defendant MICHAEL DEVEGTER received from Cole in December 1992 was compensation for services defendant MICHAEL DEVEGTER provided to clients of Cole other than Lazard.

OVERT ACTS

17. In furtherance of the conspiracy and to effect the objects and purposes thereof, the defendants, MICHAEL DEVEGTER and RICHARD POIRIER, JR., and others

known and unknown to the Grand Jury, committed overt acts in the Northern District of Georgia and elsewhere, including, but not limited to, the following:

A. In or about the summer of 1992, defendant RICHARD POIRIER, JR., authorized approaching defendant MICHAEL DEVEGTER through an intermediary, Nat Cole, to request that defendant MICHAEL DEVEGTER use his position as financial advisor to Fulton County to assist Lazard in obtaining the senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding, with the understanding that defendant RICHARD POIRIER, JR., would caused Lazard to secretly compensate defendant MICHAEL DEVEGTER through Nat Cole if Lazard obtained the senior managing underwriter position.

B. In or about the summer of 1992, Nat Cole contacted defendant MICHAEL DEVEGTER and asked for his assistance as financial advisor in obtaining for Lazard the senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate.

C. In or about the summer of 1992, defendant MICHAEL DEVEGTER advised Nat Cole that as financial advisor he did not control the underwriter selection process, however, defendant MICHAEL DEVEGTER agreed to provide assistance in Lazard's effort to obtain the senior managing underwriter position in the 1992 Fulton County Water and Sewer Bond Refunding underwriting syndicate, with the understanding that defendant MICHAEL DEVEGTER would receive compensation through Nat Cole if Lazard obtained the senior managing underwriter position.

D. In or about July 1992, defendant MICHAEL DEVEGTER, together with others, began drafting the RFP for underwriting services for, among other bond issues, the 1992 Fulton County Water and Sewer Bond Refunding.

E. On or about July 29, 1992, defendant MICHAEL DEVEGTER caused a facsimile transmission of a draft of the RFP for underwriting services to be sent to defendant RICHARD POIRIER, JR., in New York, for his review and comments on proposed questions in the RFP.

F. In or around August 1992, defendant MICHAEL DEVEGTER caused certain changes to be made to the draft RFP for the benefit of Lazard.

G. On or about August 12, 1992, defendant MICHAEL DEVEGTER caused a facsimile transmission of a near-final draft of the underwriting service RFP to be sent to James Eaton in Tallahassee, Florida.

H. On or about August 13, 1992, James Eaton caused a facsimile transmission of a copy of the near-final draft of the RFP to be sent to Lazard's New York office.

I. On or about August 17 and 18, 1992, defendant MICHAEL DEVEGTER caused the official RFP for the 1992 Fulton County Water and Sewer Bond Refunding to be sent via Federal Express for delivery by the second business day to investment banking firms that were interested in participating in the underwriting process.

J. On or about August 30, 1992, before any recommendation on underwriter selection had been submitted

to the Fulton County Commission, defendant MICHAEL DEVEGTER caused a facsimile transmission of a copy of the Bear, Stearns & Co., Inc. ("Bear Stearns"), underwriting proposal to be sent to Lazard's New York office so that Lazard could compare the Bear Stearns proposal to its own and provide the defendant MICHAEL DEVEGTER with arguments that Lazard's proposal was the better of the two.

K. On or about August 31, 1992, defendant RICHARD POIRIER, JR., or another Lazard employee acting at his direction, sent to defendant MICHAEL DEVEGTER by facsimile transmission a one-page document which analyzed and compared the underwriting proposals of Lazard and Bear Stearns, providing arguments why Lazard's proposal was the better of the two.

L. Between August 31 and September 2, 1992, defendant MICHAEL DEVEGTER instructed another banker at Stephens to review all of the underwriting proposals submitted to Fulton County in response to the RFP and to rank the proposals.

M. Between August 31 and September 2, 1992, after the other banker at Stephens completed the ranking of the underwriting proposals, the defendant, MICHAEL DEVEGTER, directed the banker to change the rankings by elevating Lazard to first-place.

N. On or about September 2, 1992, defendant MICHAEL DEVEGTER signed a joint recommendation made to the Fulton County Board of Commissioners that Lazard be awarded the senior managing underwriter position

on the 1992 Fulton County Water and Sewer Bond Refunding.

O. On or about September 16, 1992, defendant MICHAEL DEVEGTER wrote to James Eaton advising that "on September 16, 1992, the Fulton County Commission approved the recommendation of the selection committee and appointed Lazard Freres as Senior bookrunning manager for the Water and Sewer [Refunding]."

P. On or about October 29, 1992, Lazard signed the contract, also known as the bond purchase agreement, with Fulton County under which Lazard agreed to purchase the water and sewer bonds from Fulton County. The contract was adopted by the Fulton County Board of Commissioners on November 4, 1992, in a resolution authorizing the sale of the bonds. The bond were bought and ultimately resold by Lazard and other members of the underwriting syndicate on or about November 19, 1992.

Q. On or about December 1, 1992, Nat Cole completed and sent to defendant RICHARD POIRIER, JR., at Lazard, an invoice for $83,872 for services described to be "Government Consulting — Business Development/ Marketing Services." A cover letter sent by Cole with the invoice characterized the services rendered as "covered by the retainer agreement between LF and my firm."

R. On or about December 9, 1992, Lazard issued a check payable to Nat Cole & Associates, Inc., for $83,872 and, defendant RICHARD POIRIER, JR., caused the check to be delivered to Nat Cole and Associates, Inc. The check was

charged by Lazard to the account it maintained for the 1992 Fulton County Water & Sewer Bond Refunding.

S. On or about December 11, 1992, Nat Cole deposited the $83,872 check from Lazard into his firm's bank account, and, the same day, Cole wrote a check for precisely one-half of that amount, $41,936, payable to defendant MICHAEL DEVEGTER.

T. On or about December 11, 1992, defendant MICHAEL DEVEGTER had a telephone conversation with Nat Cole regarding the manner in which the $41,936 payment would be sent to defendant MICHAEL DEVEGTER.

U. On or about December 11, 1992, Nat Cole caused the $41,936 check made payable to defendant MICHAEL DEVEGTER to be delivered by Federal Express to defendant MICHAEL DEVEGTER's residence.

V. On or about December 14, 1992, the $41,936 check was deposited into defendant MICHAEL DEVEGTER's personal account at NationsBank of Georgia.

W. In or around August or September 1995, the specific dates being unknown to the Grand Jury, defendant MICHAEL DEVEGTER removed and disposed of certain documents in the Stephens' files pertaining to the 1992 Fulton County Water and Sewer Bond Refunding.

X. In or around 1995, the specific dates being unknown to the Grand Jury, defendant RICHARD POIRIER, JR., advised and encouraged James Eaton to withhold material

information about the use of false invoices to pay Nat Cole for "consulting" services.

Y. In or around December 1995 to February 1996, defendant RICHARD POIRIER, JR., advised and encouraged James Eaton to provide false statements about material facts relevant to an investigation by the Securities and Exchange Commission concerning the 1992 Fulton County Water and Sewer Bond Refunding.

Z. In or around June 1996, the specific dates being unknown to the Grand Jury, defendant MICHAEL DEVEGTER asked Nat Cole to falsely claim that the $41,936 payment defendant MICHAEL DEVEGTER received from Cole in December 1992 was compensation for services defendant MICHAEL DEVEGTER provided to clients of Cole other than Lazard.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO
(Wire Fraud)

18. The Grand Jury repeats and realleges paragraphs 2 through 17, of this Indictment as if fully set forth herein.

19. From in or about June 1992, through in or about December 14, 1992, in the Northern District of Georgia and elsewhere, the defendants, MICHAEL DEVEGTER and RICHARD POIRIER, JR., aided and abetted by each other and others both known and unknown to the Grand Jury, did

knowingly and willfully devise and intend to devise a scheme and artifice to defraud Fulton County, Georgia, and its citizens of money and property and the good, faithful and honest services of defendant MICHAEL DEVEGTER, in his capacity as a financial advisor for Fulton County, Georgia, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises.

20. On or about December 11, 1992, in the Northern District of Georgia, the defendants, MICHAEL DEVEGTER and RICHARD POIRIER, JR., aided and abetted by each other and others known and unknown to the Grand Jury, for the purpose of executing and attempting to execute the aforesaid scheme and artifice, did cause to be transmitted in interstate commerce, by means of a wire communication, certain signs, signals, and sounds, that is, defendant, MICHAEL DEVEGTER, in Atlanta, Georgia, telephoned Nat Cole in Tallahassee, Florida, regarding the manner in which the $41,936 payment would be sent to defendant MICHAEL DEVEGTER.

All in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

A TRUE BILL
FOREPERSON

s/ [illegible]

Appendix E

F. GENTRY SHELNUTT
ACTING UNITED STATES ATTORNEY

s/ Randy S. Chartash
RANDY S. CHARTASH
ASSISTANT UNITED STATES ATTORNEY
Georgia Bar No. 121760

s/ Russell G. Vineyard
RUSSELL G. VINEYARD
ASSISTANT UNITED STATES ATTORNEY
Georgia Bar No. 727890

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